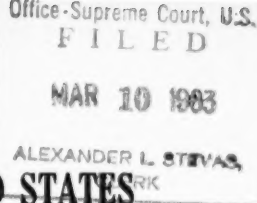


82-1515

IN THE  
SUPREME COURT OF THE UNITED STATES



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October Term 1982

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DELAWARE RIVER BASIN COMMISSION, ET AL.,  
*Respondent*

*v.*

BUCKS COUNTY WATER AND SEWER AUTHORITY,  
*Petitioner*

---

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT  
COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
(THIRD CIRCUIT COURT NO. 82-1233)**

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**PETITION OF BUCKS COUNTY WATER  
AND SEWER AUTHORITY FOR  
WRIT OF CERTIORARI**

---

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---

**I. STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW:**

- A. SHOULD CERTIORARI BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER SINCE THE CONSTITUTIONALITY OF THE COMPACT AND REGULATIONS PROVIDING FOR INTERSTATE AND FEDERAL MANAGEMENT OF THE DELAWARE RIVER BASIN ARE SIGNIFICANT AND VITAL TO THE WATER RESOURCES OF THE REGION?
- B. SHOULD CERTIORARI BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER, UPHOLDING THE CONSTITUTIONALITY OF THE PRESENT RATE STRUCTURE, BECAUSE THE RESULTING CLASSIFICATION LACKS A RATIONAL BASIS, THEREBY CONFLICTING WITH APPLICABLE DECISIONS OF THIS COURT?



## **II. LIST OF PARTIES TO PROCEEDING BEFORE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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- C. *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, 545 F. Supp. 138 (E.D. Pa. 1982)
- D. *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, No. 82-1233 (3rd Cir. 1983) Judgment Order

## **VI. STATEMENT OF SUPREME COURT JURISDICTION**

- A. A Judgment Order against Bucks County Water and Sewer Authority was issued on January 6, 1983 by the United States Court of Appeals for the Third Circuit.
- B. Bucks County Water and Sewer Authority filed a Petition for Rehearing which was denied by Order on January 31, 1983. On February 10, 1983, the Court of Appeals issued a thirty (30) day Stay of Mandate pending filing of Petition for Writ of Certiorari.
- C. The United States is given jurisdiction to review this matter by the Act of June 25, 1948, c. 646, §1, 62 Stat. 928 (28 USCS 1254).

## VII. CONSTITUTIONAL PROVISIONS, COMPACTS, STATUTES AND REGULATIONS INVOLVED

### A. CONSTITUTIONAL PROVISIONS

#### United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### United States Constitution Amendment XIV §1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any

### B. COMPACT PROVISIONS

The following are provisions of the *Delaware River Basin Compact* which are of major significance to this case. The Compact is set forth in the Appendix in its entirety.

**1.3 Purpose and Findings.** The legislative bodies of the respective signatory parties hereby find and declare:

(a) The water resources of the basin are affected with a local, state, regional and national interest and their planning, conservation, utilization, development, management and control, under ap-



appropriate arrangements for intergovernmental cooperation, are public purposes of the respective signatory parties.

(b) The water resources of the basin are subject to the sovereign right and responsibility of the signatory parties, and it is the purpose of this compact to provide for a joint exercise of such powers of sovereignty in the common interests of the people of the region.

(c) The water resources of the basin are functionally interrelated, and the uses of these resources are interdependent. A single administrative agency is therefore essential for effective and economical direction, supervision and coordination of efforts and programs of federal, state and local governments and of private enterprise.

(d) The water resources of the Delaware River Basin, if properly planned and utilized, are ample to meet all presently projected demands, including existing and added diversions in future years and ever increasing economies and efficiencies in the use and reuse of water resources can be brought about by comprehensive planning, programming and management.

(e) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principal of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.

**3.7 Rates and Charges.** The commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby, without regulation or control by any department, office or agency of any signatory party.

**15.1 Reservations.** In the exercise of the powers reserved to the Congress, pursuant to Section 1.4 of the Compact, the consent to and participation in the Compact by the United States is subject to the following conditions and reservations:

(b) No provisions of Section 3.7 of the Compact shall be deemed to authorize the commission to impose any charge for water withdrawals or diversions which could lawfully have been made without charge on the effective date of the Compact; or to impose any charges with respect to commercial navigation within the Basin, jurisdiction over which is reserved to the Federal Government; *Provided*, That this paragraph shall be applicable to the extent not inconsistent with Section 1.4 of this Compact.

#### C. DELAWARE RIVER BASIN COMMISSION RESOLUTIONS

The following is the section of DRBC Resolution 74-6 which is of major significance to this case. The entire Resolution is set forth in the Appendix.

Resolution 74-6 §15-1.3

1. "Legal entitlement" means quantity of volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(a) A valid and subsisting permit, issued under the Authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(b) Physical capability as required for such taking;

(c) The total allocable flow without augmentation by the Commission using a seven day, ten year, low-flow criterion mesh at the point of withdrawal or diversion.

## VIII. STATEMENT OF THE CASE

This Court has retained jurisdiction in a separate water case, pinpointing its realization that issues over the use of the Delaware will long remain. See *New Jersey v. New York*, 347 U.S. 995, 74 S. Ct. 842, 98 L. Ed. 1127 (1954).

Water from the Delaware River is shared for drinking purposes pursuant to this Court's opinion among Pennsylvania, New York, and New Jersey.

Anticipating the need for an even more reasoned sharing basis, in 1961, after years of discord and negotiation, these states, along with Delaware, enacted legislation, the Delaware River Basin Compact, to regulate and allocate the scarce resources of the Delaware River Basin. The United States of America ratified the Compact pursuant to Article I, Section 10, of the United States Constitution. The Compact stated (at § 1.3) its purpose to be the "planning, conservation, utilization, development, management and control of the water resources of the Basin".

The Compact established a Commission to manage the Basin, composed of member state governors and a representative of the President.

Prior to ratification, Congress added Section 15.1(b) which, along with original Section 3.7, is the root of the present controversy:

**3.7 Rates and Charges.** The commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby, without regulation or control by any department, office or agency of any signatory party.

**15.1 Reservations.** In the exercise of the powers reserved to the Congress, pursuant to Section 1.4 of the Compact, the consent to and participation in the Compact by the United States is subject to the following conditions and reservations:

(b) No provisions of Section 3.7 of the Compact shall be deemed to authorize the commission to impose any charge for water withdrawals or diversions which could lawfully have been made without charge on the effective date of the Compact; or to impose any charges with respect to commercial navigation within the Basin, jurisdiction over which is reserved to the Federal Government: *Provided*, That this paragraph shall be applicable to the extent not inconsistent with Section 1.4 of this Compact.

Section 15.1(b) prohibits charges for water which could have been lawfully withdrawn in October, 1961, when the Compact was enacted.

More than ten years later, the Commission adopted Resolution 74-6 which implemented a system of rates for withdrawals. Resolution 74-6 exempted pre-1961 users up to the amount of their legal entitlement:

In compliance with this provision, there shall be no charge for water withdrawn or diverted in quantities not exceeding the legal entitlement of the user, determined as of October 27, 1961.

The Resolution proceeds to define "legal entitlement" as follows:

1. Legal entitlement means quantity of volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(a) A valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(b) Physical capability as required for such taking;

(c) The total allocable flow without augmentation by the Commission using a seven day, ten year, low-flow criterion mesh at the point of withdrawal or diversion.

In 1966 the City of Philadelphia and Bucks County Water and Sewer Authority entered into an agreement under which Philadelphia was to supply Bucks with thirty-five million gallons of water per day. Philadelphia's defined "legal entitlement" was such that the City could withdraw the additional water within the limit set by the Resolution. The Bucks Authority requested DRBC to review the contract but were informed by the Commission that the Agreement would not have to be reviewed as it had no "substantial effect on the resources of the Basin". (See Compact Section 3.8)

In 1976, the Commission insisted that Bucks County Water and Sewer Authority be charged for withdrawals made by Philadelphia and subsequently forwarded to Bucks. The Authority refused to make payment, claiming the withdrawal was made under Philadelphia's legal entitlement. DRBC brought suit in Federal Court alleging as its basis of jurisdiction the Act of June 25, 1948, C. 646, §1, 62 Stat. 928 (28 USC 1331).

The District Court granted DRBC's motion for Summary Judgment, and BCWSA appealed to the Court of Appeals for the Third Circuit, arguing that the exemption violates the Constitutional principles of equal protection. In a 1981 Opinion a panel of that Court expressed grave doubts as to the Constitutionality of Section 15.1(b) and Resolution 74-6, but remanded the case to District Court, directing the Commission and perspective intervenors to "proffer some purpose that the Court may reasonably presume to have motivated the Congress that added Section 15.1(b) to the Compact [so] there will be a standard against which to test the rationality of Resolution 74-6". *DRBC v. BCWSA*, 641 F. 2d 1087, 1113 (3rd Cir. 1981)

On remand, the Commonwealth of Pennsylvania, Bethlehem Steel Company, and the United States Steel Company intervened on behalf of DRBC and the City of Philadelphia.

Intervening on the side of BCWSA was Western Berks Water Authority.

On remand, DRBC, the City of Philadelphia, and several of the intervenors produced voluminous documentation of the proceedings which it was hoped would provide data as to why this section of the Compact was adopted by Congress. The documents included transcripts from state hearings on the Compact, press releases, and correspondence between the framers and interested parties. Many were interesting, however, the only writings regarding Congressional ratification are a statement in the Congressional Record that Section 15.1(b) will clarify Section 3.7 and correspondence from Secretary of the Interior Udall which left us with no idea as to the purpose for Section 15.1(b).

Nevertheless, the District Court again granted Summary Judgment against BCWSA and, on Appeal to the Third Circuit Court of Appeals, Judgment was affirmed.

As a result of the Third Circuit's Judgment Order dated January 6, 1983, Bucks County Water and Sewer Authority filed this Petition for Writ of Certiorari.

## IX. ARGUMENT

### A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER SINCE THE CONSTITUTIONALITY OF THE COMPACT AND REGULATIONS PROVIDING FOR INTERSTATE AND FEDERAL MANAGEMENT OF THE DELAWARE RIVER BASIN ARE SIGNIFICANT AND VITAL TO THE WATER RESOURCES OF THE REGION.

This is not the first case involving management of the Delaware River Basin which has come before this Court. You have historically recognized the importance of the River to the mid-Atlantic water supply, and have on several occasions, heard cases involving disputes over these waters. In 1931, *New Jersey vs. New York*, 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 (1931) involved a dispute about the water between those states. In *State of New Jersey vs. State of New York*, 347 U.S. 995, 74 S.C. 842, 98 L. Ed. 1127 (1954) this Court was again called on to decide a conflict over allocation of River Basin waters. There, the Court took special note of the important and unique qualities of problems involving allocation of Basin water. In the Decree, the Court specifically retained jurisdiction of this dispute which also involved Pennsylvania, Delaware, and New York City.

*DRBC vs. BCWSA*, is another case of particular Federal importance and significant public interest. Petitioner challenges, on equal protection grounds, a rate structure which permits the Commission's annual revenue of \$500,000 to be levied on twenty-four users while over two hundred users pay nothing. Of the paying users, only five consume more than one hundred million gallons of water per month. Comparatively, of the exempted users, over seventy-five consume more than one hundred million gallons per month.

A rate structure so unevenly applied is in no rational way related to the Compact, which lists, as a specific



purpose of the Compact, the Goal to treat similarly situated users equally. (Compact Section 1.3(e))

The rate structure affects hardest certain segments of the public, and is, therefore, of great public interest. Public utilities and municipal water authorities contributed 94% of the 1981 revenue of DRBC. Expenses of these entities are passed on directly to the individual users.

The situation shows no sign of change. In fact, DRBC Resolution 74-6 allows pre-1961 users to take Basin water in amounts much greater than they were taking when the Compact was enacted. Most pre-1961 users will never reach the limit of the "legal entitlement" as defined by Resolution 74-6, and accordingly will not contribute to expensive projects which improve the Basin for the benefit of all users.

The revenue collected by the user charges is being used to finance dams and reservoirs (Beltsville Dam and Blue Marsh Reservoir). Blue Marsh, for example, is of extreme importance to the water supply of Philadelphia. In times of shortage, water is released to prevent the salt line from rising, thereby avoiding an infiltration of salt into the Philadelphia water system. Philadelphia contributes nothing to this project, while others who do not benefit, pay dearly for it.

Unless this Court grants certiorari, Philadelphia, in all probability will never pay user charges. The City currently withdraws an estimated 11.7 billion gallons of water a month from the Basin, but has a "legal entitlement" to approximately 18.8 billion gallons per month.

This Court has, in cases of public and political importance, exercised its power to grant certiorari. *Magnum Import Co. vs. Coty*, 262 S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923). *Lau Ow Bew vs. United States*, 144 U.S. 47, 12 S. Ct. 517, 36 L. Ed. 340 (1892). *Merrill Lynch, Pierce, Fenner & Smith, Inc. vs. Ware*, 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973). The issue of the management of the Delaware River Basin is of the utmost

importance to the many Basin users, and a final decision by the Supreme Court is necessary.

**B. CERTIORARI SHOULD BE GRANTED TO REVIEW THE CIRCUIT COURT'S JUDGMENT ORDER UPHOLDING THE CONSTITUTIONALITY OF THE PRESENT RATE STRUCTURE BECAUSE THE RESULTING CLASSIFICATION LACKS A RATIONAL BASIS, THEREBY CONFLICTING WITH APPLICABLE DECISIONS OF THIS COURT.**

*1. Introduction*

Petitioner Challenges Section 15.1(b) of the Delaware River Basin Compact and Resolution 74-6 as establishing a rate structure which violates Equal Protection guarantees of the Fifth and Fourteenth Amendments of the United States Constitution. The Third Circuit Court of Appeals, in their 1981 decision, examined the legislation to determine if the rate structure bore a rational relation to a legitimate purpose of the Compact. The Circuit court found no legitimate purpose for the exemption of pre-1961 users, but remanded the case to District Court in order to provide DRBC with an opportunity to offer an explanation for the exemption consistent with the purposes of the Compact.

The District and Circuit Courts upheld the constitutionality of a classification between pre and post 1961 users. Petitioner contends there is no rational basis for the classification. The lower courts' rulings are contra to previous decisions of this Court which have held that economic classifications must bear a rational relation to a legitimate purpose. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 268 (1980). *McGinnis v. Royster*, 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973). In *Mathews vs. Lucas*, 427 U.S. 495 at 510, 96 S. Ct. 2760 at 2764, 49 L. Ed. 2d 651 at 658, (1976), this Court warned that the rationality standard is not "toothless". The lower courts'

misapplication of the rational basis standard has resulted in a hardship to the many citizens who must pay higher water rates because they are served by municipal authorities which did not withdraw water until after 1961.

In applying the rational relation standard, we find the purpose of the Delaware River Basin Compact is no mystery. Compact Section 1.3 sets forth articulated purposes. These include long term and emergency planning for maintenance, conservation and allocation of Basin resources.

The purpose of the user charges is equally clear. In *Borough of Morrisville v. Delaware River Basin Commission*, 399 F. Supp 469 (1975), the Third Circuit quoting from a *Notice to Interested Parties, Water Supply Price Hearing Issues, Part II, P. 4-7* explained the "pooled water" theory. The Basin should be viewed as a single pool of water, the enlargement of which benefits all. As the DRBC Notice specifically stated.

All users benefit from a regulated pool of water. In this case, the pool is defined as the Delaware River Basin System. As water seeks its level over its entire surface, benefits tend to diffuse to users of water resources throughout the entire pool service area. So long as a reservoir, regardless of its location, contributes to the entire pool, at a justified cost, and so long as users are dependent upon the pool for their supply, benefits accrue to users at least to the extent of their alternative cost of providing the service they enjoy from the pool.

The exemption of pre-1961 users does not rationally advance this purpose, but is directly contra to it. The inquiry should properly end here. The reviewing Court is fortunate to have a stated purposes for the Compact and the user charges. Applying the proper standard, it is clear no legitimate purpose is furthered by the exemption.

However, on remand, the District Court suggested several purposes which are advanced by the exemption. The purposes are not documented in the legislative history. Petitioner addresses these purposes below, contending still that when a legislature has articulated purposes for enacting a statutory scheme, fabrication of purposes is inappropriate.

2. *Political support as a legitimate purposes.*

Of the purposes attributed to the framers of the District Court, the record shows only one to have even the slightest basis in fact. The Lower Court Opinion refers to the engendering of cooperation of existing users. Pre-1961 users admit the difficulty of gaining sufficient support from both the public and private sectors to form the Compact in 1961. The framers held numerous hearings in Pennsylvania at which major industrial users specifically Bethlehem and U.S. Steel, often appeared to state opposition to withdrawal charges.

On certiorari, this Court will be presented with the important issue of whether gaining political support for passage of a piece of legislation is a legitimate purpose for the adoption of an invidious classification.

The political support issue has been before this Court previously. *Baldwin v. Fish and Game Commission of Montana*, 435 U.S. 371, 98 S. Ct. 1852, 56 L. Ed. 354 (1978), involved a non-resident's right to hunt big game in Montana. This Court, in upholding the classification as an effort to protect the wildlife of the state, noted "that the need or desire to engender political support cannot by itself justify an otherwise invidious classification." *Baldwin*, footnote 24, citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974).

In the present case, the purpose of engendering political support is the only one which we can reasonably impute to the legislature for unilateral inclusion of the exemption. Legislative schemes made for the purpose of

gaining political support cannot withstand an equal protection challenge. If they could, any classification, no matter how invalid on other grounds, could be sustained by a determination that the discrimination is necessary to gain political support for passage.

Perhaps the most important function of this Court is to prevent exploitation of the politically weak by the politically powerful. Without Supreme Court clarification of this issue, judicial review of economic and social legislation would become a farce.

*3. Other purposes proposed by District Court were illegitimate.*

The District Court speculated to another purpose for the classification with a statement that the section in controversy may have been enacted to limit the ratemaking authority of the DRBC.

The argument begs the question. As Justices Brennan, Marshall and Stevens agreed in *Fritz*, the rational basis test requires more than "a mere tautological recognition of the fact that Congress did what it intended to do." *Fritz*, 449 U.S. at 180, 101 S. Ct. at 462, (1980).

The "power-limiting" argument cannot survive an examination of whether Congress and DCBC "achieved its purpose in an patently arbitrary or irrational way." *Fritz*, 449 U.S. at 176, 101 S. Ct. at 460, (1980). There is nothing rational about a limitation of power which operates to levy on only 10% of users water charges for projects that benefit two hundred and sixty-four of the Basin's users.

Another thought proffered by the District Court is a reliance interest by pre-Compact users on a supply of free water. This purpose is not legitimate. Reliance is not the purpose, but the benefit of an illegal classification. Reliance on the benefits of a classification could be argued as the purpose of every piece of legislation reviewed under this equal protection standard. It is impossible to conceive of a classification wherein it could not

be said that the benefitted class had relied on the classification. This is the end result of, and not a legitimate purpose for, an illegal classification. In holding otherwise, the Courts below failed to properly apply the rational relation standard, thereby departing from prior decisions of this Court. For these and other reasons, Petitioner requests certiorari be granted.

This Court has on many occasions held that a reliance interest in the benefit of economic legislation (or the lack thereof) is not justified. *Fritz, New Orleans v. Duke*, 427 U.S. 297, 96 S. Ct. 2513, 49 L Ed 511 (1976), *Duke* involved Plaintiffs who had been financially injured by a change in the legislative scheme.

*Duke* is somewhat similar to the case at bar in that a grandfather clause is supposed to be involved in each case. New Orleans street vendors who had been in business less than eight years were prohibited from continuing their trade by city ordinance. The ordinance was challenged on the basis that the classification was arbitrary. This Court held grandfather clauses permissible in an attempt to remedy a problem on a step by step basis.

The classification here is not a step by step approach, and probably not a standard *Grandfather Clause*, but a permanent exemption of pre-1961 users. While the District Court found that the classification here not permanent, such a holding is fatuous. Pre-1961 users, in virtually all instances are not individuals as Mr. *Duke*, but political subdivisions and corporate entities. Never, barring global disaster, will the Commonwealth of Pennsylvania or the City of Philadelphia cease to exist, nor most of the corporate users or major utilities.

The Resolution 74-6 definition of legal entitlement insures that the exempted users will never pay a withdrawal charges if they expand at the expected rates.

Without laboring on statistical detail, suffice it to say that in the more than twenty years since the formation of the Compact, less than 5% (13 users) of the two hundred thirty nine existing uses have surpassed their legal entitlement.

82-1515

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MAR 10 1983  
ALEXANDER L. STEVAS,  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

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October Term 1982

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DELAWARE RIVER BASIN COMMISSION, ET AL.,  
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**ON WRIT OF CERTIORARI TO THE  
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**APPENDIX TO  
PETITION OF BUCKS COUNTY WATER  
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WRIT OF CERTIORARI**

---

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 82-1232 and 82-1233

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DELAWARE RIVER BASIN COMMISSION

*v.*

BUCKS COUNTY WATER & SEWER AUTHORITY  
and CITY OF PHILADELPHIA

THE STATE OF NEW YORK; THE STATE OF NEW JERSEY;  
THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT  
OF ENVIRONMENTAL RESOURCES; WESTERN BERKS  
WATER AUTHORITY; BETHLEHEM STEEL and BETHLE-  
HEM MINES CORPORATION; G&W NATURAL RESOURCES  
GROUP; PHILADELPHIA SUBURBAN WATER COMPANY;  
CITIZENS UTILITIES HOME WATER COMPANY;  
PUBLICKER INDUSTRIES, INC.; PHILADELPHIA GAS  
WORKS; UNITED STATES STEEL CORPORATION; NORTH-  
AMPTON BOROUGH MUNICIPAL AUTHORITY

*Intervenors*

*Western Berks Water Authority,  
Appellant in No. 82-1232*

*Bucks County Water and Sewer Authority,  
Appellant in No. 82-1233*

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Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Action No. 77-2668)

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Argued December 14, 1982

Before HUNTER, GARTH, *Circuit Judges*,  
and WEBER,\* *District Judge*

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\* Honorable Gerald J. Weber, United States District Judge for the  
Western District of Pennsylvania, sitting by designation

**JUDGMENT ORDER**

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Bucks County Water and Sewer Authority and Western Berks Water Authority appeal from an order of the District Court for the Eastern District of Pennsylvania granting summary judgment in favor of plaintiff Delaware River Basin Commission and other plaintiff-intervenors. Appellants argue that the district court improperly determined that Resolution 74-5 did not violate the equal protection guarantees of the Federal Constitution. Appellants also argue that the district court erred in resolving this action by summary judgment. After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

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James Hunter, III, *Circuit Judge*

Attest:

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Sally Mrvos, *Clerk*

January 6, 1983

A-3

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVER BASIN	:	Civil Action
COMMISSION, et al.	:	No. 77-2668
<i>v.</i>	:	
BUCKS COUNTY WATER AND	:	(On remand
SEWER AUTHORITY, et al.	:	pursuant to
	:	C.A. 80-1662)

**ORDER**

For reasons which will be set out in an opinion that will issue shortly, it is hereby ORDERED that summary judgment is GRANTED in favor of plaintiff Delaware River Basin Commission and plaintiff intervenors, and defendants' cross-motion for summary judgment is DENIED.

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Pollak, J.

March 26, 1982

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVER BASIN	:	Civil Action
COMMISSION, et al.	:	
<i>v.</i>	:	
BUCKS COUNTY WATER AND	:	No. 77-2688
SEWER AUTHORITY, et al.	:	

## OPINION

POLLAK, J.

JUNE 30, 1982

This matter is here on remand from the Court of Appeals.<sup>1</sup> It presents questions as to the authority of the Delaware River Basin Commission ("DRBC") — a river-regulatory body established in 1961 by interstate compact and composed of Delaware, New Jersey, New York, Pennsylvania and the United States — to impose charges for withdrawals of water from the Delaware River. What this court must do is determine whether the scheme of water-use charges and exemptions established by DRBC eight years ago in its Resolution 74-6 satisfies the principles of equal protection enshrined in the Fourteenth Amendment and incorporated in the Fifth Amendment.

This action began as a suit by DRBC to impose water-use charges on defendants Bucks County Water and Sewer Authority ("Bucks County") and the City of Philadelphia for water drawn from the Delaware by Philadelphia and subsequently sold to Bucks County. In granting DRBC's motion for summary judgment, I determined (a) that while Philadelphia was exempt from water-use charges for withdrawals made for its own use, this exemption did not extend to withdrawals made for sale to non-exempt third parties such as Bucks County, and (b) that Resolution 74-6, imposing charges on water-users generally but exempting Philadelphia and other users having a "legal entitlement" to take water from the Delaware before the 1961 Delaware River Basin Compact, did not violate the constitutional guarantee of equal protection. Accordingly, the defendants were found liable for water-use charges imposed by DRBC pursuant to Resolution 74-6 for the water withdrawn by

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1. The opinion of the Court of Appeals is found at *DRBC v. Bucks County Water & Sewer Authority*, 641 F.2d 1087 (3rd Cir. 1981).

Philadelphia and sold to Bucks County.<sup>2</sup> See *DRBC v. Bucks County Water and Sewer Authority*, 474 F. Supp. 1249 (E.D.Pa. 1979).

Bucks County appealed from my determination that Resolution 74-6 was not constitutionally infirm. Without ruling conclusively on the constitutional question, the Court of Appeals vacated the grant of summary judgment and remanded the case to permit DRBC to proffer some rationale for the challenged Resolution that might satisfy the demands of equal protection. I thereupon directed DRBC to notify potential intervenors of the pendency of this action in order to have the benefit of their views. A host of current users of water from the Delaware River Basin have entered this case on both sides of the issue. These intervenors, along with the original parties, have worked with commendable diligence to document the legislative history of the Delaware River Basin Compact which established DRBC and set forth its powers, and to provide a fuller explanation of the purposes and operation of Resolution 74-6. The parties have now cross-moved for summary judgment.

### **I. Questions Presented on Remand**

As the opinion of the Court of Appeals makes clear, the question presented in this case is a narrow one. Under Section 3.7 of the Compact, DRBC has a limited authority to impose water-use charges on those who draw water from the Basin.<sup>3</sup> A principal limitation on this authority is found in Section 15.1(b):

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2. It was stipulated between co-defendants that any liability for water-use charges would be paid by Bucks County.

3. Section 3.7 provides:

The commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby, without regulation or control by any department, office or agency of any signatory party.

No provision of section 2.7 of the Compact shall be deemed to authorize the commission to impose any charge for water withdrawals or diversions from the Basin if such withdrawals or diversions could lawfully have been made without charge on the effective date of the Compact.

When DRBC decided in the early 1970's to implement a system of water-use charges pursuant to its Section 3.7 authority, it sought to comply with Section 15.1(b) by exempting from such charges those users who withdraw water "in quantities not exceeding the legal entitlement of the user, determined as of October 27, 1961 [the effective date of the Compact]." Resolution 74-6. The "legal entitlement" concept is defined in the following terms:

"Legal entitlement" means the quantity or volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(i) a valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(ii) physical capability as required for such taking; or

(iii) the total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.

Resolution 74-6, § 5-1.3(b)(1) (May 22, 1974).

The appeal by Bucks County was framed narrowly as an attack on Resolution 74-6's definition of the "legal entitlement" criterion governing exemptions from DRBC water-use charges. Accordingly, the constitutionality of Section 15.1(b) itself was not challenged. More-

over, the power of DRBC to promulgate Resolution 74-6 was not contested since it was clearly determined in *Borough of Morrisville v. Delaware River Basin Comm'n*, 399 F. Supp. 469 (E.D.Pa. 1975), *aff'd per curiam*, 532 F.2d 745 (3rd Cir. 1976), that DRBC had authority under the Compact to adopt the Resolution. Thus, the only question presented to the Court of Appeals was whether DRBC's method of implementing Sections 3.7 and 15.1(b) of the Compact was rationally related to a proper governmental purpose. The Court of Appeals concluded that since "it has not been demonstrated that the exemption from water use charges conferred on certain users of Basin water by Resolution 74-6 is rationally related to the attainment of a legitimate state purpose, we cannot sustain — at least at this time — the Resolution. . . ." *DRBC v. Bucks County*, *supra*, 641 F.2d at 1100. The remand was designed expressly to provide the Commission and any intervenors with an opportunity to "proffer some purpose that the court may reasonably presume to have motivated the Congress that added Section 15.1(b) to the Compact, [so that] there will be available a standard against which to test the rationality of Resolution 74-6." *Id.*<sup>4</sup>

Therefore, in considering the parties' cross-motions for summary judgment on remand, I must first examine the purposes which the Congress may reasonably have sought to advance in enacting Section 15.1(b), and then determine whether the classifications found in Resolution 74-6 are rationally related to accomplishing such purposes.

#### A. The History of the Compact:

In order to address these particular questions, it may be helpful to review the legislative and administra-

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4. The Court of Appeals noted that on remand this court could look to statements of purpose in the Compact, the Compact's legislative history, general public knowledge concerning the problems sought to be resolved by the Compact, prior law, and formal public pronouncements. See 641 F.2d at 1092-93 & n.9.

tive history which led to the adoption of the Delaware River Basin Compact.

The early history of conflicts among various competing users of Delaware River Basin water suggested quite strongly the need for some independent regulatory agency charged with the responsibility of managing efficiently the use of these scarce water resources. Until the establishment of DRBC in 1961, the principal means for resolving these disputes were a series of litigations involving some of the largest water users. In 1931, the Supreme Court first addressed such a conflict, holding that New York City would be permitted, over New Jersey's objection, to divert a specified amount of water from the Basin. *See New Jersey v. New York*, 283 U.S. 336 (1931). The conflict erupted again twenty years later and was ultimately resolved by a consent decree entered into by New Jersey and New York City and approved by the Court. *New Jersey v. New York*, 347 U.S. 995 (1954). The 1954 consent decree permitted New York City and New Jersey to withdraw water without charge in amounts established by a new formula.

This method of resolving disputes was perceived by the various affected groups to be unsatisfactory and in 1955 the Delaware River Basin Advisory Committee — the precursor of DRBC — was established by the Governors of New York, New Jersey, Delaware and Pennsylvania and the Mayors of New York City and Philadelphia. Its principal mission was to explore alternative ways to allocate and manage the water resources of the Basin and to develop an overall plan to guide its development. *See Delaware River Basin Research, Inc., Prospectus* 6-9 (April 16, 1957). The Advisory Committee commissioned a study by the Graduate School of Public Administration of Syracuse University. Building on reports by the Army Corps of Engineers and the work of the Interstate Commission on the Delaware River Basin (INCodel), the 1959 "Syracuse Report" outlined the initial blueprint for a compact and a regulatory commis-



sion and also sketched the basic agenda for the Advisory Committee. See Water Research Foundation, *A Brief Report on the Study of Governmental Organization for the Water Resources of the Delaware River Basin by the Maxwell Graduate School, Syracuse University*, 10-28 (1959).

By early 1960 a draft compact was circulated by the Advisory Committee. Following a series of meetings with various state groups, the Advisory Committee developed several revised drafts. At a summit meeting of Governors and Mayors, a Final Draft Compact was approved and these leaders agreed to submit the Final Draft to the four state legislatures and Congress for approval. See W. B. Whitall's Notes on Executive Session of Summit Meeting of February 1, 1961 (Feb. 7, 1961). In early 1961, the four states considered and approved the Final Draft.

Apparently, the scope of DRBC's power to levy water withdrawal charges on existing users received little or no attention from the legislatures of the first three states to approve the Final Draft — New York, New Jersey and Delaware. However, the issue was discussed extensively when the Final Draft was considered by the Pennsylvania legislature. Much of this discussion was prompted by representatives of various industry groups which opposed the imposition of water-user fees for withdrawals that had been made without charge prior to the Compact. Thus, on May 2, 1961, Governor David Lawrence, addressing representatives of several steel and oil companies, noted that while he opposed any amendment of the Final Draft, he felt that the legislature's intention not to impose water-withdrawal charges on existing uses could be clarified by a committee report or other legislative history. In Governor Lawrence's view, this step would provide ample protection for industry groups concerned about such charges. See Advisory Committee, *Delaware River Compact Status Report No. 6* at 2 (May 18, 1961). The Pennsylvania Senate's Com-

mittee on Forests and Waters also conducted hearings on this issue. In a report issued May 23, 1961, the Committee made clear its understanding that the Compact granted DRBC only a limited rate-making authority:

As to the charges for water that are permissible under Section 3.7 of the Compact, it is again elementary law that a corporate agency of the signatory parties would have only those powers actually delegated to it. Nowhere in the Compact is there any power to make withdrawal charges for water taken from the river in its natural state. The Commission's only power to make charges is "for the use of facilities which it may own or operate and for products and services rendered" by such facilities. The Commission plainly does not own or operate the river, as a facility or otherwise, and, therefore, could make no charge of the kind suggested. This is confirmed as to present industrial, domestic and municipal users (Section 1.3 (e)) which flatly states that one of the purposes of the Compact is "to make secure and protect present developments within the states; . . . and *to apply the principle of equal and uniform treatment to all water users who are similarly situated . . .*"

Committee on Forest and Waters, Report on Pennsylvania Senate Bill No. 350 at 3 (May 23, 1961). Following the Committee's recommendation, the Pennsylvania legislature approved the Final Draft and it was signed by Governor Lawrence on July 7, 1961. In a statement released that day, the Governor provided a further explanation of legislative intent with respect to the new Commission's power to levy water-user charges:

Nowhere in the Compact is there any power to make withdrawal charges for water taken from the river except as Commission improvements provide water not previously available. The Commission's

only power to make charges is 'for the use of facilities which it may own or operate and for products and services rendered' by such facilities. The Commission plainly does not own nor operate the river, as a facility or otherwise, and, therefore, could make no charge of the kind suggested. Consequently, Pennsylvania adopts the Compact with the intent and understanding that the Commission shall not have power to impose any charge for water withdrawals or diversions from the Basin *if such withdrawals or diversions could lawfully have been made without charge on the effective date of the Compact.*

*Statement of Gov. Lawrence at 3 (July 7, 1961) (emphasis added).*

None of the four state legislatures added any amendments to the Final Draft since this would have required referral back to the other states for approval of the amended version. See Report on Pennsylvania Senate Bill No. 350, *supra*, at 1. However, under Section 1.4 of the Final Draft, Congress was granted a reserve power to add amendments, which would not require state approval, as a condition of federal participation in the joint state enterprise. Section 15.1(b) — the Compact provision at issue here — was added, together with certain other amendments, pursuant to that reserve power at the behest of Secretary of the Interior Morris Udall. The purpose of Section 15.1(b), according to Secretary Udall, was "to clarify the intent of Section 3.7." Letter to Senator James Eastland from Morris Udall, Secretary of the Interior, on H. J. Res. 225 Addendum at 2 (Aug. 15, 1961) (setting forth proposed amendments to the Compact). Indeed, the amendment — which exempted from water-user charges, withdrawals which "could lawfully have been made without charge on the effective date of the Compact" — was a verbatim transposition of Governor Lawrence's statement regarding Pennsylvania's understanding into an express provision of the Compact.

Secretary Udall also noted that the general structure of the Compact and the several federal amendments were the product of lengthy discussions with representatives of the signatory states. Largely because the states had finally reached an agreement, thereby ending a long history of failed attempts to develop a Basin-wide plan, and because of the "urgent need for resource planning and development in this area of mounting congestion," Secretary Udall recommended approval of the Compact and the proposed federal amendments. See Udall letter to Sen. Eastland, *supra*, at 3. This sense of historic achievement was echoed by Senator Joseph Clark of Pennsylvania. See Hearings on Senate Bill No. 856 at 42 (Aug. 24, 1961). Congress approved the Compact, and it was signed by President Kennedy on November 2, 1961.

**B. *The Purposes of Section 15.1(b):***

The foregoing recital sets out the provenance of the *language* of Section 15.1(b). It also suggests in a generalized way the *purposes* underlying the language. Translating those general purposes into a detailed blueprint of what the Pennsylvania legislature, Governor Lawrence, Secretary Udall and Congress had in mind is less easy. In that sense, the Court of Appeals' prediction that it would be difficult "to divine legislative intent . . . when the legislature acted two decades past and left no clear trace of its designs," 641 F.2d at 1100, has to some extent been borne out. But, as the Court of Appeals added, "it is doubtful whether the actual purpose of the Congress need be established." *Id.* at 1100. Instead, it is sufficient that the Commission come forward with some legitimate public purpose which may reasonably have been entertained by Congress. *Id.* at 1097. See also *Railroad Retirement Bd. v. Fritz*, 101 S.Ct. 453, 461 (1980).

After considering the parties' lengthy submissions and hearing oral argument, I am satisfied that it is possible to identify certain proper governmental purposes

which Section 15.1(b) was not only presumptively but probably designed to serve.

Perhaps the most obvious purpose animating the Congress that added Section 15.1(b) was the imposition of some limitation on the rate-making power of DRBC. The legislative history of the Compact shows that as the Delaware River Basin Advisory Committee sought to frame the powers of a regulatory agency for the Basin, it faced considerable opposition from industry groups which had enjoyed free use of Basin water. See Memorandum in Support of the Motion for Summary Judgment filed by Intervenor Bethlehem Steel Corp., Bethlehem Mines Corp., and U.S. Steel Corp. at 18-24. Early drafts of the Compact had contained provisions for delegating a broad authority to impose water use charges on *all* users. Eventually, these plans were discarded in favor of a more limited approach. Compare Proposed Federal-State Compact (Draft "B") § 10.9 (Mar. 1, 1960) with Interstate-Federal Compact (Final Draft) §§ 11.3; 12.1; 14.1(a)(2). It was generally agreed at the time of the Compact's enactment that the principal financing of DRBC's projects would come from grants made by the signatory states and the federal government rather than from DRBC-imposed water-use charges. See Udall letter to Sen. Eastland, *supra*, at 1 (noting that DRBC projects would be financed "through loans, grants or the issuance of bonds"); Report on Pennsylvania Senate Bill No. 350, *supra*, at 4. See also Compact §§ 12.1 and 14.1(a)(2). Moreover, the remarks of Governor Lawrence discussed earlier suggest quite clearly that DRBC's financing authority was limited so that those groups which had established positions in the Basin could continue to withdraw Basin water without charge

at their anticipated levels of use. See *Statement of Gov. Lawrence, supra*.<sup>5</sup>

Thus, it is clear that the framers of the Compact made a characteristically legislative judgment about the type of financing authority which would be conferred on the new Commission. Such a decision to grant only limited rate-making authority must be viewed against the background of issues and considerations which produced the Compact. It is important to bear in mind the unusual and untested character of what was to be undertaken by DRBC. In order "to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin," Compact §1.3(e), the Compact's authors evidently considered it necessary to preserve expressly the pre-1961 users' privilege of free water use so that the fledgling Commission's chances of winning the cooperation of existing users would be increased.<sup>6</sup>

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5. In addition, the Section 15.1(b) exemption from water withdrawal charges for all pre-1961 users operated to preserve in *status quo ante* the entitlement of all pre-Compact users to withdraw water without charge on a parity with the rights to free use of New Jersey and New York City that were secured by the 1954 Consent Decree and confirmed by Section 3.5 of the Compact. Section 3.5 provides in part:

Except as specifically provided in Sections 3.3 and 3.4 of this article, nothing in this compact shall be construed in any way to impair, diminish or otherwise adversely affect the rights, powers, privileges, conditions and obligations contained in the decree of the United States Supreme Court in *New Jersey v. New York*, 347 U.S. 995 (1954). To this end, and without limitation thereto, the commission shall not: . . .

(b) Impose or collect any fee, charge or assessment with respect to diversions of waters of the basin permitted by said decree . . .

6. In the course of its opinion, the Court of Appeals considered an argument advanced by counsel for DRBC that a particular purpose of the exemption in Section 15.1(b) and Resolution 74-6 was the preservation of pre-Compact rights to free water use embodied in state permits as part of state water allocation systems (e.g., Phila-

Put another way, the enactment of Section 15.1(b) could reasonably have been grounded on a legislative judgment that to adopt the Compact without exempting existing users from water-use charges would court an unacceptable risk of diminishing DRBC's prospects for successfully administering the water resources of the Basin. To have omitted such a requirement for apportioning financing burdens would have put a cloud over DRBC's early efforts to establish a workable plan for development and conservation. It is clear from Section 1.3(c) of the Compact and from the legislative history that promotion of cooperative planning was one of the Compact's general purposes. *See* Water Research Foundation, *Brief Report, supra*, at 3-6, 21. Thus, the addition of Section 15.1(b) can reasonably be seen as an attempt to ensure the cooperation of affected user groups whose expertise and information might be necessary to DRBC's early efforts to administer the Basin's resources. Similarly, Section 15.1(b) appears to have been

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delphia's permit). Citing language from Section 10.1 of the Compact which gives DRBC power to "regulate and control withdrawals and diversions" of Basin water, the Court of Appeals reasoned that since the Compact conferred on DRBC broad powers to regulate withdrawals and thereby to affect pre-Compact rights, the contention that Section 15.1(b) embodies Congress' tacit "solicitude for the state allocation systems" was implausible. 641 F.2d at 1099. However, Article 10, taken as a whole, contemplates only a very qualified supersession of state allocation systems: Drought—emergencies apart, DRBC is given authority to "control withdrawals" only in "protected areas" of the Basin found to be endangered by water shortages. DRBC's decision to designate an area as "protected" can be made only after public hearings, and the determination of DRBC is subject to judicial review. *See* §§10.2; 10.6 *See also* §10.4. Thus, rather than conferring a broad regulatory power antithetic to Section 15.1(b)'s reservation of authority, Article 10 is clearly consistent with Section 15.1(b) in that the framers of the Compact were careful to restrict DRBC's powers so that it would intrude in only a narrowly defined manner on the rights of pre-Compact users.



prompted in some measure by a desire to avoid dislocations which might undermine the development of orderly plans for water resource management and the production of reliable predictions of expected growth and industrial use.

A corollary purpose, related to the principal purpose identified in the legislative history of limiting DRBC's rate-making power, was the preservation of pre-existing development and the protection of the significant reliance interests of those who withdrew Delaware River Basin water without charge prior to the creation of DRBC. Such a purpose seems to be clearly consonant with the general goal stated in Section 1.3(e) of the Compact of "mak(ing) secure and protect(ing) present developments within the states.<sup>7</sup> See also Pennsylvania Senate Committee Report on Bill No. 350, *supra*, at 3.

In the case at hand, it is difficult to catalogue with precision the full range of reliance interests developed by pre-Compact users which Section 15.1(b) sought to protect. But, it is a fair inference that these interests extended beyond the levels of actual water use in 1961 to include a substantial reliance by these users on their full "legal entitlement" — defined by Resolution 74-6 — as of the Compact's enactment. An industrial enterprise which as of 1961 had large water-use requirements would expectably have made future projections con-

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7. Section 1.3 (e) provides:

In general, the purposes of this compact are to promote interstate comity, to remove causes of present and future controversy; to make secure and protect present development within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principal of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.



cerning the continued maintenance of its facilities and the possible expansion of existing facilities based not only on its then current level of water withdrawals but also on the basis of its anticipated needs and on the likely availability and cost of water. Thus, such an enterprise would have relied heavily on continued access to free water up to the amount of its "legal entitlement" in planning its long-term development. In much the same way, a municipality on the banks of the Delaware would have grounded its decisions concerning plans for anticipated population growth or the expansion of municipal services not only on its 1961 level of use but also on its expectations about the continued availability of free water up to a specified amount. A wide array of planning decisions relating to zoning, water supply, sewage treatment, etc. would have been reasonably based on and would have substantially relied upon the availability of free water. A significant change in these expectations could have caused serious economic and political dislocations.

For the most part, courts have found that governmental purposes such as the ones canvassed above are proper grounds for insulating enterprises already *in situ* from the burdens of a newly adopted regulatory scheme.<sup>8</sup>

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8. For example, see *Minnesota v. Clover Leaf Creamery Co.*, 101 S.Ct. 715 (1981), sustaining a Minnesota environmental protection statute, which in anticipation of the entry into the retail milk market of "throwaway" plastic milk containers, banned retail milk sales in non-returnable, non-refillable containers, but exempted from the ban containers of less than 50% plastic content — i.e., paperboard milk containers which are already in wide use. Acknowledging Minnesota's interest in reducing "economic dislocation" in the dairy industry, *id.* at 725, and in protecting the "substantial reliance interests in continued operation" of paperboard container manufacturers, *id.* at 726, the Court ruled that: "The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems merely because another type, already established in the market, is permitted to continue in use." *Id.* at 725.

C. *The Rationality of Resolution 74-6:*

With this review of the legislative purposes of Section 15.1 (b) as preface, I turn now to the central question whether the classifications adopted in DRBC Resolution 74-6 are rationally related to the accomplishment of the Compact's purposes.

For the first ten years of its management of the Basin, DRBC did not seek to exercise its Section 3.7 power to impose water-use charges. Then, in 1971, DRBC began the process of developing a plan for levying such charges to help defray the cost of maintaining its water-storage facilities. *See* Resolution 71-4. There followed a series of public hearings which culminated in the adoption of Resolution 74-6 in 1974. The task of developing the Resolution was carried out principally by William Miller, general counsel to DRBC during this period. As Mr. Miller observed, the first difficulty for DRBC was interpreting the Compact provision, Section 15.1 (b), that exempted from water-use charges withdrawals which "could lawfully have been made without charge" when the Compact took effect. *See* Public Hearing of DRBC, Testimony of William Miller, Tr. at 7 (Mar. 26, 1974).

The Resolution, as finally adopted, established two principal criteria for measuring the extent of a user's entitlement to continued free water use. A user's legal entitlement could be established either by the amount of water it was entitled to withdraw without charge under a valid state permit held at the time of the Compact's enactment or by the amount of water which the user had the physical capacity to withdraw when the Compact was enacted. *See* Resolution 74-6, § 5-1.3(b) (i) and (ii).<sup>9</sup>

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9. Apparently, many pre-Compact users were not required to and, hence, did not make their withdrawals pursuant to a state permit. Consequently, in order to measure the amount of water that these users "could lawfully have [withdrawn] without charge," DRBC established the user's actual pumping capacity at the time of

Because the exemption provision of the Compact conferred, in Mr. Miller's words, "a special privilege," DRBC insisted that the scope of the exemption be strictly construed and, accordingly, a user's entitlement to free water use was determined by the lesser of the two criteria described above. See Miller Testimony, *supra*, Tr. at 7. A third benchmark — based upon a "seven-day, ten-year, low-flow criterion" — is essentially a provisional method of measuring legal entitlement that is reserved for emergency periods of water shortage. *Id.* at 8; Resolution 74-6, § 5-1.3(b) (iii). As counsel for DRBC explained at oral argument, this low-flow provision is designed to ensure that during times of drought, users will not be injured by unreasonable diversions by upstream users. Thus, the principal methods chosen by DRBC for measuring a user's right to free water use are the user's entitlement under a valid state permit or the user's actual pumping capacity, whichever is less. The question then is whether these two criteria constitute a rational means to further the Compact purposes identified earlier.

In its opinion remanding the case for further proceedings, the Court of Appeals expressed considerable doubt about the propriety of exempting pre-Compact users from charges for water diversions within their "legal entitlement" but exceeding their pre-Compact actual use. That dubiety was rooted in the rationale for Section 15.1(b) which, in sustaining Section 15.1(b) and Resolution 74-6, this court had previously articulated —

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the Compact's enactment as the controlling index. See Miller Testimony, *Supra*, Tr. at 7-9.

In addition, because many pre-1961 users had not maintained records of their actual water use in 1961 and not all pre-1961 users had recorded permits, the Commission determined that if a pre-Compact user's entitlement could not be established as of 1961, a user could submit proof of entitlement based on permits or pumping capacity as of 1971. See Miller Testimony, *supra*, Tr. at 8; Resolution 74-6, § 5-1.3(a).

namely, that "Congress may well have supposed that, broadly speaking, the Delaware River and its tributaries met the water use needs of the region as of 1961, and that most Commission projects aimed at enlarged and more equitable water allocation would be geared to meeting needs developing after the effective date of the Compact." 474 F. Supp. at 1255. The Court of Appeals properly observed that:

If Section 15.1(b) reflects a policy that users of Basin water who place demands on Basin resources exceeding those made in 1961 should pay for Commission projects undertaken to satisfy those demands, then Resolution 74-6, by forcing some users to pay those costs while exempting others, appears to be an arbitrary, rather than a rational, implementation of that policy.

641 F.2d at 1098 (footnote omitted).

After rejecting this narrow rationale, the Court of Appeals expressed some further misgivings about the rationality of Resolution 74-6. Two features of the system of water-use charges and exemptions established by the Resolution prompted the Court of Appeals' concern: (a) the broad scope of the scheme, which exempts not only a user's actual water usage as of 1961, but also the full "legal entitlement," and (b) the apparently permanent character of the exemptions. Both appeared, in the Court of Appeals' view, to lack a rational basis. *See* 641 F.2d at 1098-99.

As to the first concern, the broader light shed by the record developed on remand has made it apparent that this court's initial perception of the purposes of Section 15.1(b) was too narrow. As developed in Part I(B) of this Opinion, it now appears probable that Congress, taking its cue from Secretary Udall and Governor Lawrence and the Pennsylvania legislature, sought to protect not merely the existing but the anticipated water uses of those industries and municipalities which as of 1961

were taking water from the Delaware and were "legally entitled" to do so. As I noted earlier, Resolution 74-6 limits a pre-1961 user's legal entitlement to the user's actual physical pumping capacity if that amount is less than the full extent of its state permit. Given that scheme, the scope of a pre-1961 user's reliance upon free water is matched with a reasonable degree of precision by the terms of the DRBC rule. This is because the rule generally operates to safeguard a user's concrete investment in a level of pumping capacity sufficient to meet the user's anticipated needs but, when that capacity is less than a user's permit level, the rule does not protect the more abstract expectations of free entitlement up to the full amount of the user's state permit.<sup>10</sup> Thus, the rule operates in a relatively restrictive manner to limit the exemption from water-use charges. But, it nevertheless serves to protect significant reliance interests. Indeed, as a DRBC staff report — issued after public hearings were held on the Resolution — explained, an important part of the rationale for the Resolution's differential treatment of pre-1961 and post-1961 users was that "[i]ndustrial newcomers to the basin water resources do not have a vested right established at the time of Compact enactment since they were not on the river and dependent upon an established supply." DRBC Staff, *Water Supply Pricing Hearing Issues — Part II*, p. 14 (May 1974).

With respect to the second concern voiced by the Court of Appeals, it is clear that the Compact exemption from water — use charges for pre-1961 uses, as implemented by the DRBC Resolution, is not wholly permanent. By prohibiting the transfer of free water use rights, see Resolution 74-6, § 5-2.1(d), DRBC has made it likely that some significant number of pre-1961 uses will not

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10. Whether, with respect to a user such as Philadelphia which had a state permit but whose 1961 pumping capacity was less than the amount specified in the permit, Resolution 74-6 can validly qualify the apparent breadth of Section 15.1(b) by restricting free water use to the permittee's 1961 pumping capacity, is an issue not posed by this litigation. See 641 F.2d at 1098 n.22.

be perpetually exempt since the initial user may go out of existence and be replaced by a new user which will not be permitted to acquire the former entitlement. *See Water Supply Pricing Hearing Issues — Part II, supra*, at 12. As the identity of users changes over time, there will be a gradual decrease in the total amount of water use exempted from withdrawal charges. *See* Affidavit of Robert L. Goodell, Schedule "B" at 1, 3, 6 and 14 (noting (a) pre-1961 users which were sold to successors which do not enjoy an entitlement and therefore pay charges; and (b) pre-1961 users which have exceeded their entitlement and therefore pay charges).

Of course, given the terms of Resolution 74-6, some users — for example, municipalities such as Philadelphia — are likely to maintain permanently their present exemptions from water withdrawal charges. Plainly, insofar as Resolution 74-6 may be expected to "grandfather" the free water-use of some pre-Compact users on a permanent basis, it must be carefully reviewed. And the Court of Appeals is certainly right that the Supreme Court differentiates between temporary and permanent grandfathering — a differentiation exemplified by *New Orleans v. Dukes*, 427 U.S. 297 (1976). However, the Supreme Court has not said that permanent grandfathering is *per se* bad. Compare *Minnesota v. Clover Leaf Creamery Co.*, *supra*, 101 S.Ct. at 726; *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 6, 9 (1970) — and note particularly that *New Orleans v. Dukes*, *supra*, expressly overruled *Morey v. Doud*, 354 U.S. 457 (1957) (invalidating an Illinois statute imposing regulations on all credit card institutions other than American Express Company). The upshot would seem to be that permanent grandfathering calls for somewhat more exacting insistence on the rationality of the classification than temporary grandfathering. In the instant case, if, as this court is persuaded, Resolution 74-6 is a rational implementation of Section 15.1(b) as properly understood, that ends the inquiry, for Section 15.1(b) is



itself a grandfathering provision — a provision not challenged in the Court of Appeals and not open to challenge here.

Seen in this light, the discrimination between pre-1961 and post-1961 users established by Resolution 74-6 does not treat identical groups differently, but rather establishes a financing scheme which respects two significant distinctions between these groups: First, it acknowledges the extent to which the cooperation of existing users was necessary to the early period of DRBC's work; and, secondly, it recognizes the different degree of reliance interest in free water use. Thus, the classification drawn in the Resolution between pre-1961 and post-1961 users is not one that is "wholly without any rational basis," *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973). Instead, this classification appears to help promote the general goals of the Compact and it directly fulfills the express differentiation intended and accomplished by Section 15.1(b).

To be sure, these are somewhat speculative reasons. But the Supreme Court has made clear that it is not necessary under the applicable constitutional test that this water use charge system be the best or the most fair, or even for the legislative judgment to be based on accurate assumptions. See *Railroad Retirement Bd. v. Fritz*, *supra*, 101 S.Ct. at 459; *Schweiker v. Wilson*, 101 S.Ct. 1074, 1083 (1981). Instead, it is sufficient that the legislature could have reasonably entertained these concerns and sought to address them through this classification. In the same way as in *Minnesota v. Clover Leaf Creamery*, *supra*, the Congress and DRBC were entitled to believe that this method of financing future Basin improvements would better achieve the goal of efficient water resource management by enlisting the cooperation of existing users, protecting established reliance interests from disruption, and avoiding potential economic dislocation. This may not represent the *best* method, but the rational relationship test does not impose on legislatures the obligation to devise a flawless or empirically accurate

scheme.<sup>11</sup> See *Murillo v. Bambrick*, No. 81-1786, slip op. at 21-22 (3d Cir. June 17, 1982). As the Supreme Court has stated:

In the area of economics and social welfare, a State [and correspondingly under the Fifth Amendment the federal government] does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.'

*Schweiker v. Wilson*, *supra*, 101 S.Ct. at 1082-83 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)) (citations omitted).

In sum, I find that the system of water-use charges and exemptions found in DRBC Resolution 74-6 differentiates among users of Delaware River Basin water in a manner that is rationally related to the goals of preserving existing development and protecting significant reliance interests that are embodied in the provisions of the Compact. It was for this reason that, on March 26, 1982, I entered an order granting summary judgment in favor of plaintiff DRBC and plaintiff intervenors, and denying defendants' cross-motion for summary judgment.

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Pollak, J.

June 30, 1982.

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11. This case differs significantly from the recent decision of the Supreme Court in *Zobel v. Williams*, 50 U.S.L.W. 4613 (1982). There, the Court, applying the rational relationship test, struck down an Alaska program which distributed dividends from a state mineral resources fund to adult residents, with the amount of the dividend determined by duration of residency. Unlike the instant case, in *Zobel* no incumbent class had built up any reliance interest whatsoever in an existing set of rights or privileges which would be adversely affected by the state program. Accordingly, the legislative purpose of protecting such interests — which is of decisive importance for this case — was not present in *Zobel*.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVER BASIN  
COMMISSION

v.

BUCKS COUNTY WATER & SEWER  
AUTHORITY

CIVIL  
ACTION

NO. 77-2668

**ORDER**

Pursuant to the conference held this day, it is hereby ORDERED:

1. Leave to intervene in this action is GRANTED as to the following movants:

- A. The State of New York;
- B. The State of New Jersey;
- C. The Commonwealth of Pennsylvania,  
Department of Environmental Resources;
- D. Western Berks Water Authority;
- E. Bethlehem Steel and Bethlehem Mines  
Corporations;
- F. G&W Natural Resources Group;
- G. Philadelphia Suburban Water Company;
- H. Citizens Utilities Home Water Company;
- I. Publicker Industries, Inc.;
- J. Philadelphia Gas Works;
- K. United States Steel Corporation;
- L. Northampton Borough Municipal Authority.

2. The motions of the State of New Jersey (1) for the admission of James R. Zazzali, Esq., Attorney General, and Helen G. Bornstein, Esq., Deputy Attorney General, to represent the state *pro hac vice*, and (2) for waiver of Local Rule 13(a) and to have all papers served upon the State at the Office of the Attorney General of New Jersey, 36 West State Street, Trenton, New Jersey 08625, are GRANTED.

3. All counsel shall meet July 27, 1981, at the offices of Delaware River Basin Commission in Trenton to begin (1) to exchange relevant documents and (2) to prepare a joint statement of documentary evidence.

4. Plaintiff and intervenors aligned with plaintiff shall submit motions for summary judgment and supporting memoranda by September 30, 1981.

5. The next conference shall be held October 5, 1981 at 9:30 a.m. in Courtroom 13B, United States Courthouse, Philadelphia, Pennsylvania.

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Pollak, J.

July 20, 1981

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 80-1662

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DELAWARE RIVER BASIN COMMISSION

v.

BUCKS COUNTY WATER & SEWER AUTHORITY.  
*Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(C.A. No. 77-2668)

Argued November 6, 1980

Before: ADAMS and SLOVITER, *Circuit Judges*,  
and BROTMAN, *District Judge*\*

(Filed February 18, 1981)

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VICTOR S. JACZUN (Argued)

JACZUN & GRABOWSKI

Perkasie, Pa. 18944

*Attorney for Appellant*

DAVID J. GOLDBERG (Argued)

Warren, Goldberg & Berman

Princeton, New Jersey 08540

*Attorney for Appellee*

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\*Honorable Stanley S. Brotman, United States District Court for the District of New Jersey, sitting by designation.

## OPINION OF THE COURT

ADAMS, *Circuit Judge*.

The Bucks County Water and Sewer Authority (the Authority) appeals from an order of summary judgment entered against it by the district court. The Delaware River Basin Commission (the Commission) had sued the Authority in an attempt to impose charges for water that the City of Philadelphia had drawn from the Delaware River and sold to the Authority. Because we are not convinced that the Commission's assessment of charges against the Authority comports with the constitutional guarantee of equal protection, we vacate the judgment of the district court and remand.

## I

From its headwaters in the Catskill Mountains of New York, the Delaware River flows generally southward, framing the greater part of the border between Pennsylvania and New Jersey before reaching the sea off the coast of Delaware. Coherent development of the River's resources proved impossible when left to the uncoordinated decisions of each of the four riparian states.<sup>1</sup> In order to ensure adequate management and conservation of the River and its tributaries, collectively referred to as the Delaware River Basin, the riparian states in 1961 entered into the Delaware River Basin Compact. Recognizing the federal interests in proper supervision of the River, the United States also became a party to the Compact, which was ratified by Congress pursuant to Article I, Section 10 of the Constitution.<sup>2</sup>

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1. The need for regional action was evidenced by the legal controversies over use of the River's waters, two of which were resolved by the Supreme Court. See *New Jersey v. New York*, 347 U.S. 995 (1954); *New Jersey v. New York*, 253 U.S. 336 (1931).

2. Act of Sept. 27, 1961, Pub. L. No. 87-328, 75 Stat. 688. The Compact has been codified by each of the signatory state govern-

The Compact sets as its goal the "planning, conservation, utilization, development, management and control of the water resources" of the Delaware River Basin. Compact §1.3. To accomplish these ends, the Compact establishes the Delaware River Basin Commission, whose membership includes the Governors of the four signatory states and one representative of the President. Compact §2.1, .2. Among its powers,<sup>3</sup> the Commission has the authority to impose charges for the use of facilities it owns and operates. Compact §3.7. When Congress considered the Compact, however, it limited this authority by adding Section 15.1(b), which forbids charges for water drawn from the Basin if the withdrawal "could lawfully have been made without charge on the effective date of the Compact."

During its first ten years, the Commission did not exercise its authority to levy charges for use of Basin water. In 1971, however, the Commission passed Resolution 71-4, authorizing charges. The Commission did not actually begin to collect charges until 1974, when, with the adoption of Resolution 74-6, it implemented a system of rates and exemptions for the use of the surface waters of the Delaware.<sup>4</sup>

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ments. See Del. Code Ann. tit. 7, §§6501-6513 (Supp. 1970); N.J. Stat. Ann. §§32-11D-1 to -115 (1963 F. Supp. 1980); N.Y. Conserv. Law §§801-812 (McKinney 1967); Pa. Stat. Ann. tit. 32, §§815.101 to .106 (Purdon 1967).

3. The signatory governments granted broad powers to the Commission, thereby offering the agency "a realistic opportunity to effectuate a comprehensive plan that concerned itself with water quality as well as water supply, hydroelectric power, recreational areas, wildlife conservation, and flood protection." B. Ackerman, *The Uncertain Search for Environmental Quality* 4 (1974).

4. Revenues obtained through water charges were intended to defray the Commission's costs of building water storage capabilities into the Blue Marsh and Beltzville Reservoirs. See generally *Borough of Morrisville v. Delaware River Basin Comm'n*, 399 F. Supp. 469, 471-75 (E.D. Pa. 1975), *aff'd per curiam*, 532 F.2d 745 (3d Cir. 1976).

The Resolution gives effect to Section 15.1(b) of the Compact by dispensing with charges for those who use, withdraw or divert water "in quantities not exceeding the legal entitlement of the user, determined as of October 27, 1961 [the effective date of the Compact]."<sup>5</sup> The Resolution defines "legal entitlement" as follows:

1. "Legal entitlement" means the quantity or volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(i) a valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(ii) physical capability as required for such taking; or

(iii) the total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.

Resolution 74-6 imposed a charge of \$.04 per thousand gallons for surface water consumed by users and \$.0004 per thousand gallons withdrawn for non-consumptive uses; these rates have since been increased to \$.06 and \$.0006, respectively.

In 1966, eight years before the Commission began to assess charges for use of Basin water, the Bucks County Water and Sewer Authority entered into an agreement with the City of Philadelphia, under which the City contracted to supply the Authority with 35,000,000 gallons of water per day. The Authority sub-

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5. The Resolution also provides that, in the absence of proof of a user's "legal entitlement" as of the Compact's effective date, the quantity of water exempt from charge is that user's "legal entitlement" determined as of March 31, 1971.

mitted this agreement to the Commission for approval under Section 3.8 of the Compact. The Executive Director of the Commission responded that Section 3.8, which requires the Commission's endorsement of any project "having a substantial effect on the water resources of the [B]asin," did not require review of the contract between the Authority and the City. Philadelphia began delivering water to Bucks County in 1970, and has done so continually since then.

Late in 1976, the Commission requested that the City of Philadelphia bill the Authority, based on the charges called for by Resolution 74-6, for the water the City supplied to Bucks County. Philadelphia refused, stating that it did not wish to function as a "collection agency" for the Commission. The Commission then wrote to the Authority, indicating that the Authority had no legal entitlement to any water from the Basin free of the Commission's charges, and requesting that the Authority remit to the Commission the money owed under Resolution 74-6. The Authority replied that it owed no money. It contended that the water it purchased from Philadelphia could have been withdrawn by the City free of charge on the effective date of the Compact, and hence fell within the "legal entitlement" exemption of Resolution 74-6.

The Commission eventually brought suit against both the Authority and the City of Philadelphia. Philadelphia crossclaimed against the Authority for indemnification in the event the City was held liable to the Commission. The district judge granted the Commission's motion for summary judgment.<sup>6</sup> Since the Authority acknowledged that neither it nor its predecessors enjoyed any independent legal entitlement to draw water from

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6. The opinion of the district court is reported at 474 F. Supp. 1249 (E.D. Pa. 1979). The district court entered summary judgment against both the Authority and the City; it also granted the City's request for indemnification.

the Delaware, the district court reasoned that the Authority's claim to exemption could succeed only if, as of the effective date of the Compact, Philadelphia had "a valid and subsisting permit, issued under the Authority of Pennsylvania," to take water from the Delaware in the quantity and for the purpose comprehended by the City's agreement with Bucks County. The district court concluded, after reviewing Pennsylvania law, that the permit authorizing Philadelphia's massive daily draw from the River did not contemplate Philadelphia's resale of a portion of this water to outlying municipalities. Bucks County thus was not entitled to exemption from the Commission's charges. The court also rejected the Authority's contentions that the Commission had actually approved the County's use of Delaware River water free from charges, and that Section 15.1(b) of the Compact, as implemented by Resolution 74-6, violates Federal constitutional principles of equal protection.

## II

On appeal, the Authority challenges the district court's holding on the equal protection issue. The Authority does not frame its constitutional challenge as an attack on Section 15.1(b) of the Compact, however. Instead, it maintains that Resolution 74-6 implements the Compact's "grandfather" provision in an unconstitutional manner. Thus, the Authority does not contend that *any* difference in treatment as among users of Basin water would violate equal protection, but only that a discrimination based on "legal entitlement" as defined by Resolution 74-6 cannot survive constitutional scrutiny.

The Authority does not challenge the other holdings of the district court. In particular, the Authority does not press the principal argument on which it relied in the district court: that, as of the Compact's effective date, the City of Philadelphia had a valid and subsisting permit under Pennsylvania law to withdraw water from the



Delaware and sell it to other municipalities. Moreover, the Authority makes no claim that, as of the effective date of the Compact, it had an independent legal entitlement to divert water from the Delaware River Basin. Both in its brief and at oral argument, the Authority acknowledged that it has never enjoyed such an entitlement. In effect, Bucks County concedes that if it were to build its own facilities for withdrawing River water, the terms and charges of Resolution 74-6 would apply to such diversions.

Just as the Authority no longer controverts the applicability of Resolution 74-6 to its purchase of Basin water, neither does it contend that in enacting Resolution 74-6 the Commission exceeded its powers under the Compact. This latter issue was presented in *Borough of Morrisville v. Delaware River Basin Comm'n*, 399 F. Supp. 469 (E.D. Pa. 1975), *aff'd per curiam*, 532 F.2d 745 (3d Cir. 1976), where it was held that the Commission acted within its authority in adopting Resolution 74-6. The *Morrisville* decision helps illuminate the Authority's claim to challenge the constitutional validity only of the implementation of Section 15.1(b), rather than of the Section itself. Section 15.1(b) immunizes from water use charges any "withdrawals or diversions which could lawfully have been made without charge on the effective date of the Compact." Although use of the term "lawfully" might suggest that a user's rights under state law to withdraw water should serve as the measure of its exemption, Resolution 74-6 grants immunity only to the extent of pumping capacity for those users whose intake capabilities on the Compact's effective date fell short of the amount they were authorized by state law to withdraw. By endorsing Resolution 74-6 as a proper implementation of Section 15.1(b), the courts have indicated that the Compact tolerates measuring the extent of the "grandfather" exemption by standards other than the state law entitlement of the user. Moreover, there

has been no indication that tests different from those codified in Resolution 74-6 might not also constitute proper applications of Section 15.1(b). Thus in challenging the constitutionality of exemptions based on the criteria of Resolution 74-6, the Authority need not necessarily challenge the constitutionality of Section 15.1(b) itself, since there might be other methods of implementing the Section that are consistent both with the Compact and the Constitution.

We note that the constitutional challenge the Authority raises was not presented in *Borough of Morrisville*. To the contrary, the district court in that case stated: "Plaintiff has not raised any equal protection challenge to Section 15.1(b) as it has been applied here, and we take no position on its constitutionality." 399 F. Supp. at 474 n.4. We now take up the merits of the equal protection challenge posed by the Authority.

### III

Well-settled principles of constitutional law require us to apply only "minimal" judicial scrutiny to the classification at issue here. Since Resolution 74-6 neither apportions benefits and burdens on the basis of a "suspect classification" nor impinges on "fundamental interests," it violates equal protection only if it bears no rational relationship to a legitimate state purpose. *United States Railroad Retirement Board v. Fritz*, 49 U.S.L.W. 4035, 4038 (U.S. Dec. 9, 1980) (No. 79-870); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). In *Vance v. Bradley*, 440 U.S. 93 (1979), the Supreme Court detailed this standard of review:

[C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial interven-

tion is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

*Id.* at 97 (footnotes omitted).<sup>7</sup> Enactments of Congress and other legislative bodies<sup>8</sup> carry a presumption of constitutionality, and the burden rests on those challenging a classification to show that it is not rationally related to

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7. The Court in *Bradley* upheld Section 632 of the Foreign Service Act of 1946, 22 U.S.C. §1002 (1976), which requires mandatory retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system. The Court found this provision supported by a rational basis, even though no mandatory retirement age is established for Civil Service employees, including those who serve abroad.

The Supreme Court will review certain equal protection challenges under more stringent standards: strict and intermediate scrutiny. The former test — whether the challenged classification is necessary to the accomplishment of a compelling state interest — thus far has been reserved for discriminations based on race, national origin, alienage, and for classifications made on account of the exercise of a constitutional right. The latter standard — whether the discrimination substantially furthers the achievement of an important governmental objective — thus far has been applied only to classifications based on gender or illegitimacy. For a collection of cases, see generally G. Gunther, *Constitutional Law* ch. 10 (10th ed. 1980).

8. How the constitutional challenge in the present case is conceptualized — whether as directed against the signatory states or the Congress — does not affect the resolution of this appeal. Although the Fourteenth Amendment's guarantee of equal protection applies only to the states, the Supreme Court has held that the Due Process Clause of the Fifth Amendment forbids the federal government from denying equal protection of the laws, see *Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). Equal protection analysis is "precisely the same" under both amendments, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); see *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

its purpose. See *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Yet, while a court should not strike down classifications simply because it deems them unwise or inartfully drawn, see *United States Railroad Retirement Board v. Fritz*, 49 U.S.L.W. at 4038, we are admonished that the rationality standard is not "toothless," see *id.* at 4040 (Brennan, J., dissenting); *Mathews v. Lucas*, 427 U.S. at 510.

When reviewing a classification under the rationality test, then, a court must conduct a two-step analysis. First, it should identify the purposes of the statute and assure itself that these purposes are legitimate; ordinarily, this inquiry will involve examination of statements of purpose and other evidence in the legislative history.<sup>9</sup> Second, having identified the governmental purposes, the court must determine whether the classification is rationally related to the achievement of these goals.<sup>10</sup>

Applying these principles to the case at hand,<sup>11</sup> we first look for the purposes underpinning the "grand-

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9. See *Malmed v. Thornburgh*, 621 F.2d 565, 572-73 (3d Cir. 1980) (legislative history of statute setting mandatory age for state judges disclosed four legitimate purposes for the provision). In addition, the court might consider general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, and formal public pronouncements. See *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1077 (1969); H. Hart & A. Sacks, *The Legal Process* 1413-16 (Tent. ed. 1958).

10. Some commentators have maintained that the legislature is better equipped than a court to determine whether its purposes are furthered by the legislation it enacts. They conclude that the rationality standard is not an appropriate basis for judicial review. See Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976); Posner, *The De Funis Case and The Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1. But see Michelman, *Politics and Values, or What's Really Wrong with Rationality Review?*, 13 Creighton L. Rev. 487, 503-06 (1979) (criticizing this view).

11. Neither party to this appeal suggests that, because the challenged classification was devised by an administrative rather

father" provision whose implementation, through Resolution 74-6, the Authority challenges. As noted above, Congress added Section 15.1(b) to the Compact as a precondition to federal participation. Unfortunately, the legislative history of Congressional ratification of the Compact does not disclose the purposes behind Section 15.1(b). The Report of the Senate Committee on Public Works notes generally that Congress added amendments to the Compact "in order to provide minimum protection of federal interests." S. Rep. No. 87-985, 87th Cong., 1st Sess. 6 (1961). But as Judge Newcomer observed in *Borough of Morrisville*, "It is unclear from the legislative history . . . what the federal interest is in insuring that pre-1961 users be exempt from Commission charges." 399 F. Supp. at 474.<sup>12</sup>

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than legislative body, principles other than those of conventional "bottom tier" equal protection scrutiny should apply. Moreover, in applying rationality analysis, courts generally do not subject administrative action to more exacting scrutiny than that accorded legislative decisions. See, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). But cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-16 (1976) (Civil Service Commission cannot assert objective that is proper responsibility of President or Congress). The equivalent treatment of legislative and administrative choice has on occasion been questioned, however. See Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1187 (1977); Bennett, "Mere" Rationality in Constitutional law: *Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049, 1049 n.1 (1979). Generally absent from administrative decisionmaking is the safeguard of correction of unwise policy choices by the democratic process — the safeguard cited by the Supreme Court in *Vance v. Bradley*, 440 U.S. at 97, as underpinning rational basis analysis. In addition, while a legislature must be assumed to understand its own objectives and to allocate burdens and benefits in furtherance of them, this assumption becomes more attenuated when the classification in question is drawn by an administrative agency.

12. See also *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 474 F. Supp. 1249, 1255 (E.D. Pa. 1979) (Pollak, J.) ("The legislative history does not make clear why Congress chose to add Section 15.1(b) to the Compact.")

Neither does the background information relating to the Commission's adoption of Resolution 74-6 reveal what purpose the Commissioners believed supported the Compact's exemption provision, or what objectives the Commissioners had in mind in structuring the exemption in the manner the Resolution prescribes. While the Commission did indicate, in a public notice, its reasons for establishing water use charges, these reasons seem at best unrelated, and perhaps even contrary, to the practice of allowing established users to withdraw water free of charge. Until 1974, the Commission relied on the general revenues of the member states to meet the financial obligations it incurred. With Resolution 74-6, the Commission altered its method of defraying the costs of storing water in the Basin's reservoirs: the states would still finance a portion of the costs, but charges levied on individual users of the River's waters would also be used to meet part of the costs. In *Borough of Morrisville*, the district court explained the rationale for water use charges:

The theory behind the user charges was that the River Basin should be seen as one pool of water [with] each user benefiting from the enlargement of the pool's water supply regardless of whether the water stored in the reservoirs directly benefit the user. In explaining the "pooled water" concept, the Commission stated:

All users benefit from a regulated pool of water. In this case, the pool is defined as the Delaware River Basin System. As water seeks its level over its entire surface, benefits tend to diffuse to users of water resources throughout the entire pool service area. So long as a reservoir, regardless of its location, contributes to the entire pool, at a justified cost, and so long as users are dependent upon the pool for their supply, benefits accrue to users at least to the extent of their

alternative cost of providing the service they enjoy from the pool. Notice to Interested Parties, Water Supply Pricing Hearing Issues, Part II, pp. 4-7.

According to this concept, the upriver user pays towards a downriver reservoir in lieu of replacing the water which it takes from the River.

399 F. Supp. at 471.

The "pooled water" concept underlying the Commission's system of water use charges does not explain the exemption for pre-1961 users. If anything, the Commission's statement suggests that such exemptions are inconsistent with the "pooled water" theory. Since all users benefit from a regulated pool of water, it is difficult to perceive what legitimate purpose is served by charging only some users for the use of that regulated pool.

In short, neither the Congress, when it added Section 15.1(b), nor the Commission, when it adopted Resolution 74-6, identified a legitimate goal that is furthered by exempting certain users of Basin waters from the charges shouldered by others. Consequently, if the challenged "grandfather" exemption is to survive rationality review, we must look elsewhere to find the governmental purposes which it helps secure.

#### IV

Traditionally, in the absence of an articulated purpose in the legislation or in its history, courts have upheld challenged provisions that furthered the attainment of goals either suggested by the parties or postulated by the reviewing court itself. Before examining whether Section 15.1(b) and Resolution 74-6 advance purposes that might be hypothesized in these ways, we must consider the propriety in this case of such speculation about legislative ends.



The Supreme Court has on occasion expressed a willingness to sustain a classification that serves some conceivable purpose, even though the Court has no assurance that the purpose entered the mind of even a single legislator. Perhaps the clearest expression of this viewpoint came from Justice Harlan in *Flemming v. Nestor*, 366 U.S. 420 (1960). In concluding that the denial of social security benefits to certain types of deportees was rational because the benefits would not have added to the "overall national purchasing power," Justice Harlan wrote that it was "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Id.* at 612. On this theory, a court may discern a valid purpose even in the face of legislative silence, with the court's imagination supplying the only bounds to the range of purposes that might be attributed.

During the twenty years since *Flemming*, however, the Supreme Court has sometimes indicated that rationality analysis must consider the *actual* purposes of the legislature, rather than post hoc justifications offered by government attorneys or hypothesized by the court itself. For instance, in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975), the Court, through Justice Brennan said:

This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrated that the asserted purpose could not have been a goal of the legislation.<sup>13</sup>

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13. Although *Wiesenfeld* exemplifies the "middle tier" of equal protection scrutiny, see *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 95-100 (1975), the Court's reluctance to rationalize a classification on the basis of purposes that cannot reasonably be attributed to the legislature has surfaced as well in cases involving "bottom tier" equal protection analysis. See *Eisenstadt v. Baird*, 405 U.S. 438, 447-52 (1972).



And in *McGinnis v. Royster*, 410 U.S. 263, 270 (1973), the Supreme Court indicated that a challenged classification will survive rationality analysis when it "rationally furthers some legitimate, articulated state purpose." See also *id.* at 276 (purpose upholding a statutory class must be "legitimate and nonillusory"); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973) (classification must further a "legitimate, articulated purpose").

Significantly, the Supreme Court, while testing the constitutionality of a "grandfather" provision, has emphasized the importance of articulating the legislative purpose. In *United States v. Maryland Savings-Share Insurance Corp. (MSSIC)*, 400 U.S. 4 (1970) (per curiam), the Court upheld a section of the Internal Revenue Code that exempted from taxation any nonprofit corporation that insured savings institutions, provided the corporation existed as of September 1, 1957. The Court observed that "the legislative history of [the challenged provision] affirmatively discloses that Congress had a rational basis for declining to broaden the exemption by extending the cutoff date" (emphasis supplied).<sup>14</sup> Moreover, the Court distinguished *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936) — a Depression-era case that struck down a state price support system that had favored only dealers who had entered the market before a certain date — by noting that "according to the Court in [*Maryland Farms*], the legislative record contained no affirmative showing of a valid legislative purpose." 400 U.S. at 7 n.2.<sup>15</sup>

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14. Testimony before the Senate Finance Committee on a proposal to extend the cutoff date to January 1, 1963 had indicated that continued forward movement of the date might lead to a proliferation of state insurers, and that this could hinder the operations and threaten the financial stability of the Federal Savings and Loan Insurance Corporation.

15. By declining to overrule *Mayflower Farms*, we believe that the Supreme Court in *MSSIC* at least intimated that a grandfather provision such as we have here conceivably might fail the rational

The opinion in *MSSIC*, then, appears to suggest the possibility that a "grandfather" provision will not survive equal protection scrutiny unless the legislative history reveals some specified purpose for its inclusion in the statute. Such a rule might be rationalized on the ground that "grandfather" clauses possess especially strong potential for abuse of the political process. By definition, a "grandfather" clause confers an economic advantage on those engaged in a given activity at a specified date as against all those who participate in the activity for the first time after the date. At least on its face, favoritism of this sort might often appear the product of a political arrangement "that does no more than favor one interest at the expense of another,"<sup>16</sup> rather than the result of a reasoned judgment about a socially beneficial policy.<sup>17</sup> Such a danger is especially great when, as in the present case, the regulation of which the "grandfather" provision is a part is enacted not for the benefit of the general public, but for the benefit of the same group that is regulated.<sup>18</sup> Requiring the legislature to make known its rea-

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NOTE 15 — (*Continued*)

basis test. We therefore cannot agree with the dissent's suggestion that equal protection scrutiny of purely economic regulation was "finally put to rest" by *Ferguson v. Skrupa*, 372 U.S. 726 (1963). *Skrupa*, it is important to note, turned primarily on the Court's rejection of due process analysis to strike down economic regulations, and, in any event, was decided seven years before *MSSIC*. While we doubt that *Skrupa* disposes of the equal protection issue present in the case before us, we acknowledge that almost all economic and social regulation will survive rational basis scrutiny. We do not intend with today's decision to invite the judiciary to substitute its judgment on economic and social questions for that of the legislature. Instead, our only concern is whether there is a reasonable basis to support the specific regulation challenged here.

16. Bennett, *supra* note 11, at 1083.

17. For an examination of the capacity of rationality review to screen out legislative acts that are exploitive, see Michelman, *supra* note 10, at 498-511.

18. Most regulation that typically is "grandfathered in" is aimed at protecting the general public. For example, a requirement

sons for adopting a "grandfather" clause would provide the reviewing court with some assurance that the provision does not represent political exploitation of one group at the expense of another.<sup>19</sup>

Notwithstanding these considerations, we are reluctant to hold that the "grandfather" provision challenged here can survive equal protection scrutiny only if shown to further some legitimate goal actually set forth in the legislative history. In a recent statement on the rational basis standard, a majority of the Supreme Court emphasized that, at least when social and economic legislation is at issue, courts generally should defer to legislative classifications. *United States Railroad Retirement*

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stipulating that, in order to be admitted to the bar, a lawyer must have graduated from an accredited law school, but exempting current members of the bar, is aimed at protecting the public from incompetent legal assistance. The exemption for current practitioners reflects a judgment that these individuals have already demonstrated their competence, and that they have substantial reliance interests in obtaining their livelihood through the practice of law. By contrast, the levying of water charges by the Commission is aimed at securing a benefit not for the public at large but for the very group that is regulated — users of Basin water. This congruence between the class of persons regulated and the class of beneficiaries makes the favoring of some regulatees through adoption of a "grandfather" provision particularly questionable. It was largely because of a similar congruence that the Supreme Court struck down the "grandfather" clause challenged in *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936). There New York established minimum prices for the sale of milk, but gave special pricing privileges for certain dealers who had been in the business as of April 1933. The Supreme Court found it significant that the group whose prices were regulated was also the group the legislature hoped to assist through regulation, and concluded that under these circumstances a discrimination in treatment based on when a dealer entered the business must be regarded as arbitrary. *Id.* at 274.

19. We note that, in the present case, it might be argued that the interests of politically powerful users have overborne those of more modest users. The exemptions of Resolution 74-6 would appear to work to the advantage of some of the largest consumers of Basin water — for example, the City of Philadelphia.

*Board v. Fritz*, 49 U.S.L.W. 4035 (U.S. Dec. 9, 1980) (No. 79-870). Although the Court did not address the question whether a reviewing court should examine the relation of a classification to purposes supplied by the court's own speculation, in *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972), one of two cases cited approvingly in *Fritz* as exemplifying the proper approach to rationality scrutiny,<sup>20</sup> the Court appeared to engage in such hypothesizing. While the Court in *Fritz* did not have occasion to consider whether a somewhat less deferential attitude might be appropriate when a "grandfather" provision is challenged, the regulation before us would appear to fit within the category of "social and economic" regulation of which the Court spoke. Moreover, to cabin the judicial imagination by imposing a stated-purpose requirement would, as Professor Fiss points out, seem inconsistent with judicial practice in other areas, such as determining whether legislation is authorized by the enumerated powers. Fiss, *Groups and The Equal Protection Clause*, in *Equality and Preferential Treatment* 84, 90 (M. Cohen, T. Nagel & T. Scanlon eds. 1977). For these reasons, we decline to hold that Section 15.1(b) and Resolution 74-6 are invalid because neither Congress nor the Commission has stated the purpose behind a "grandfather" exemption for water use charges. So long as we are careful not to attribute to the legislature purposes which it cannot reasonably be understood to have entertained,<sup>21</sup> we find that in examining the challenged provisions we may consider purposes advanced by counsel for the Commission or suggested initially by ourselves.

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20. 49 U.S.L.W. at 4036 n.10. The other case cited was *Dandridge v. Williams*, 397 U.S. 471 (1970).

21. Justice Brennan has pointed out the dangers of attributing to a legislature purposes it did not in fact entertain: "If a legislature, considering the competing factors, determines that it is wise policy to treat two groups of people differently in pursuit of a certain goal,

## V

In upholding Resolution 74-6 on equal protection grounds, the district court evidently concluded that it was free to speculate on the possible objectives underlying these provisions. After noting that "the legislative history does not make clear why Congress chose to add Section 15.1(b) to the Compact," the Court added:

But it seems entirely expectable for Congress to have elected to distinguish between uses of Basin waters legally sanctioned as of 1961 and uses which would arise and seek legal sanction in the future. Congress may well have supposed that, broadly speaking, the Delaware River and its tributaries met the water use needs of the region as of 1961, and that most Commission projects aimed at enlarged and more equitable water allocation would be geared to meeting needs developing after the effective date of the Compact.

474 F. Supp. at 1255. The district court, then, postulated that the "grandfather" provisions sought to shield established users from costs incurred by the Commission in meeting the needs of post-1961 users.

While this might, in theory, be an appropriate goal, we doubt whether this purpose explains the challenged regulation. As noted above, the Commission itself recognizes that all users, both established and new, benefit from a regulated pool of water, and specifically, that all

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NOTE 21 — (Continued)

courts often defer to that legislative determination. But when a legislature has decided *not* to pursue a certain goal, upholding a statute on the basis of that goal is not properly deference to a legislative decision at all; it is deference to a decision which the legislature could have made but did not." *Schlesinger v. Ballard*, 419 U.S. 498, 520 n.11 (1975) (Brennan, J., dissenting). See also Gunther, *The Supreme Court 1971 Term — Forward: In Search of Evolving Doctrine on Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 43-46 (1972).

users benefit from storing water in reservoirs, whether or not a particular user draws from the stored water. If we accept the Commission's own rationale for imposing charges for use of Basin water, it would appear that all users benefit from the projects whose costs the charges are meant to defray, and that exemptions from charges cannot be justified as intended to apportion charges in relation to benefit.

Even assuming, however, that the water use charges are designed, at least primarily, to distribute the costs of Commission projects among those users whose demands for Basin water arose after 1961, we fail to perceive how Resolution 74-6 bears a rational relation to that goal. For the Resolution does not make the measure of exemption the actual usage as of the effective date of the Compact, but relies on other criteria, such as state-issued permits, pumping capacity, and allocable flow. A user who withdrew Basin water before 1961 might thereafter have increased the amount of water drawn from the Basin's resources, thereby contributing to the increasing demands for Basin water, yet have remained exempt from water use charges so long as the increased diversions did not exceed the user's "legal entitlement" as defined in Resolution 74-6. The City of Philadelphia, an original party to the present suit, provides a case in point. Although Philadelphia has a "legal entitlement" to 423,000,000 gallons of Basin water per day,<sup>22</sup> the City's actual usage has never approached this

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22. The Commission has asserted, in a separate proceeding, that Philadelphia's "entitlement" under Resolution 74-6 is not 423,000,000 gallons per day, as specified in a permit issued by the Pennsylvania Department of Forests and Waters in 1955, but a lower quantity reflecting the City's pumping capacity as of 1961. This lesser quantity is nonetheless higher than Philadelphia's actual aggregate draw from the Delaware in 1961 or any time since. See *Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth.*, 474 F. Supp. 1249, 1253 n.8 (E.D. Pa. 1979). This administrative proceeding has no bearing on the present appeal.

amount. Nonetheless, under the rate scheme of Resolution 74-6, Philadelphia could increase its usage well beyond its current level and remain within its exemption — even though its increased withdrawal would be among the uses which have come into existence after 1961 and which have required the Commission to undertake conservation projects. If Section 15.1(b) reflects a policy that users of Basin water who place demands on Basin resources exceeding those made in 1961 should pay for Commission projects undertaken to satisfy those demands, then Resolution 74-6, by forcing some users to pay those costs while exempting others, appears to be an arbitrary, rather than a rational, implementation of that policy.<sup>23</sup>

While the rate scheme of Resolution 74-6 might conceivably be constitutionally permissible if the favored treatment for established users were merely temporary, one striking characteristic of the exemption as granted is its permanency. One theme of equal protection law is that a legislature may undertake reforms one step at a time, and that a reviewing court ordinarily should not overrule a legislative decision simply because the challenged provision adopts a gradual approach to solving a problem.<sup>24</sup> This principle has been cited in cases involving challenges to “grandfather” provisions. In *New*

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23. A slightly different perspective helps illuminate the problem we see with Resolution 74-6. If Philadelphia were to stop selling water to Bucks County, and instead were to divert the water it currently sells to uses arising within the City, then under Resolution 74-6 no charges would be levied, even though the amount of water withdrawn by Philadelphia would be precisely the same as under the arrangement now in effect. We fail to perceive how a rate structure that tolerates this result is rationally conducive to the goal of fair allocation of the costs of Commission projects, or to the Commission's more general goals of conservation and equitable management of the Basin's water resources.

24. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955).



*Orleans v. Duke*, 427 U.S. 297 (1976) (per curiam), the Supreme Court upheld a New Orleans ordinance that prohibited pushcart vendors from selling food in the French Quarter, but excepted those vendors who had operated in the Quarter for eight years or more. The Court observed that "[l]egislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Id.* at 303 (citations omitted). Noting that the older vendors had "built up substantial reliance interests in continued operation" in the French Quarter, the Court concluded; "Rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage." *Id.* at 305.

Judicial toleration of step-by-step legislative action, however, does not save the provisions challenged in the present case. The Supreme Court in *Dukes* could sanction a gradual approach since the challenged exemption would eventually expire; in time, all of the vendors allowed to continue work in the French Quarter would retire, and the ban on vendors would become absolute. In our case, however, Resolution 74-6 grants a *permanent* exemption for pre-1961 users to the extent of their "legal entitlement." Nothing in the record suggests that the Commission some day will alter this exemption. It would involve sheer speculation on our part to regard the Resolution as the first step toward eventual requirement of contributions from all users who exceed their 1961 demand for Basin water, rather than as a grant of permanent immunity for some.

Moreover, the "reliance interests" cited in *Dukes* do not apply to the exemption from water use charges as codified in Resolution 74-6. While a user arguably has a reliance interest in continuing to withdraw, free of charge, the amount of Basin water diverted before the



Compact became effective, we perceive no reliance interest in free enjoyment of an amount exceeding actual usage.

For these reasons we disagree with the district court's conclusion that Resolution 74-6 can be rationalized as an attempt to distribute the costs of regulation among users whose recent demands have made regulation necessary. The apparently permanent exemption granted those users who withdraw more water than they did in 1961, but less than their 1961 "legal entitlement," persuades us, at least at this time, that Resolution 74-6 is not a rational means to this end.

## VI

In addition to the reviewing court's own speculations, a justifying rationale for a classification might originate with the agency charged with administering the challenged provision.<sup>25</sup> At oral argument, counsel for the Commission suggested as the purpose for the exemptions of Section 15.1(b) and Resolution 74-6 the preservation of those rights to water that existed as of the effective date of the Compact. As recognized in Resolution 74-6, by 1961 some users had obtained permits, authorized by state law, to withdraw or divert Basin water. In adding Section 15.1(b) to the Compact, Congress may have been expressing its wish to protect political entities that had already received rights to Basin water, so that they would not be worse off under the Compact than before. While the district court understood the water use exemption as an attempt to allocate regulation costs fairly, this proposal regards the exemption as directed toward conserving rights granted before the Compact.

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25. See Gunther, *supra* note 19, at 47 (a judicially cognizable purpose need not be set forth in statutory preamble or legislative history; description of purpose from official charged with enforcement should suffice).

We find this suggestion unsatisfactory. The terms of the Compact make clear that the broad regulatory powers granted the Commission include the authority to override whatever allocation systems had earlier been devised by signatory states. Section 10.1 of the Compact states: "The Commission may regulate and control withdrawals and diversions from surface waters . . . of the Basin." And Section 10.8 provides: "Whenever the Commission finds it necessary or desirable to exercise the powers conferred on it by this article, any diversion or withdrawal permits authorized or issued under the laws of any of the signatory states shall be superseded to the extent of any conflict with the control and regulation issued by the Commission." Read together, these Sections reveal that, notwithstanding recognition at state law, a user's pre-1961 rights to the enjoyment of Basin water may have to yield to the regulatory enactments of the Commission. These Sections belie any suggestion that solicitude for the state law allocation systems superseded by the Compact was an unarticulated motive of the Congressional amendments.

A more fundamental objection might be leveled against the suggested purpose for Section 15.1(b). Various commentators have observed that it is always possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another. A statute's classifications will invariably be rationally related to a purpose so defined, since the "purpose" is, in effect, a restatement of the classification.<sup>26</sup>

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26. See Bennett, *supra* note 11, at 1059; Fiss, *Groups and the Equal Protection Clause*, in *Equality and Preferential Treatment* 84, 107 (M. Cohen, T. Nagel & T. Scanlon eds. 1977); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 Yale L.J. 123, 128 (1972). Professor Fiss offers the following illustration: "[L]et us assume that the policy at issue is one preferring blacks for admission to law school. The first impulse is to identify the purpose as one of increasing the number of black lawyers. . . . But what appears at first to be a purpose seems to be nothing more than a restatement of

To engage in such hypothesizing however, would be to render the rational basis standard no standard at all. As Justice Stevens noted while concurring in *United States Railroad Retirement Board v. Fritz*, 49 U.S.L.W. 4035, 4039 (U.S. Dec. 9, 1980) (No. 79-870): "If the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any 'conceivable basis' for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do."

The suggestion that Congress intended, in adding Section 15.1(b), to preserve without interference or burden those state-created rights in existence on the effective date of the Compact comes dangerously close to the type of tautological explanation against which Justice Stevens has warned. While Section 15.1(b) as implemented by Resolution 74-6 has the effect of dividing users into two classes — those who had "legal entitlements" as of 1961 and those who had not — this Court should be wary of confusing the classification itself with a legitimate state purpose underlying it.

## VII

Thus far, we have been unable to conceive of any rationale for the exemption of Resolution 74-6, other than those already considered. Inasmuch as it has not been demonstrated that the exemption from water use charges conferred on certain users of Basin water by Resolution 74-6 is rationally related to the attainment of a legitimate state purpose, we cannot sustain — at least at this time — the Resolution against the constitutional challenge mounted by the Authority. The only remaining question is whether remand to the district court

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the practice. Why does the state want to increase the number of black lawyers? The answer to this question yields what may more properly be deemed a purpose." Fiss, *supra*, at 107.

would serve a useful function. At oral argument, counsel for the Commission argued against remand, maintaining that no further evidence of the purposes underlying Section 15.1(b) could now, almost twenty years after adoption of the Compact, be advanced. Notwithstanding the Commission's candid acknowledgement of these difficulties, we believe it more prudent to remand the present controversy than to grant final disposition by this Court. The difficulties attending any effort to divine legislative intent no doubt are greatly magnified when the legislature acted two decades past and left no clear trace of its designs. But as we earlier concluded, it is doubtful whether the actual purpose of the Congress need be established. So long as the Commission can proffer some purpose that the court may reasonably presume to have motivated the Congress that added Section 15.1(b) to the Compact, there will be available a standard against which to test the rationality of Resolution 74-6. We believe the Commission should have an opportunity to attempt this type of explanation.

In addition, remand may prompt pre-1961 users to intervene in the lawsuit. Modification of the Resolution 74-6 exemption would adversely affect users, such as the City of Philadelphia, who currently enjoy immunity from water use charges. We believe it would be helpful, before a final decision on the constitutionality of the Resolution is made, if representatives of these parties were provided an opportunity to appear before the court to advance their arguments for maintaining the current system of exemptions.

Accordingly, the judgment of the district court will be vacated and the case remanded.

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27. The posture of the Authority also counsels in favor of remand rather than reversal. Although the Authority moved for summary judgment before the district court and appealed from the court's denial of its motion, in both the Authority's brief and oral argument before this Court it has requested no more drastic remedy than remand.

BROTMAN, *District Judge*, dissenting:

The majority opinion is both thoughtful and scholarly. In my judgment, however, the majority ultimately arrives at an incorrect result. Therefore, I must respectfully dissent.

Initially, it is worthwhile to note that I concur with the majority in the applicability of the rational basis standard of scrutiny. The reasons underlying this deserve brief mention. First, we are concerned here with a purely economic regulation, one that has no effect on any fundamental rights. The sole question before us is who must pay the Commission for water withdrawn from the Delaware.<sup>1</sup> Secondly, there can be no contention that the statutory scheme at issue here invidiously discriminates against any suspect class. Surely, the predominantly suburban residents of Bucks County have access to the political process to effect any needed reforms. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Harzenski & Weckesser, *The Case for Strictly Scrutinizing Gender-Based Separate But Equal Classification Schemes*, 52 Temp. L.Q. 439, 450-52 (1979). Hence, because a purely economic regulation is at issue and because no suspect class is implicated, the proper standard of scrutiny is that of the rational basis test.<sup>2</sup>

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1. Of course, even if the important issue of access to water were involved here, which it is not, we would nonetheless employ minimal scrutiny. Access to water is not the kind of fundamental constitutional right that merits equal protection strict scrutiny. See generally *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

2. In footnote 11 the majority advances the intriguing idea that administrative agency regulations may deserve more careful scrutiny than statutes adopted by elected legislatures. That idea may have merit in general, but it is inapplicable here. If one compares Commission Resolution 74-6 with Section 15.1(b) of the Compact, it is

The rational basis test demands that a statutory or regulatory classification be rationally related to a legitimate governmental end. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It does not demand that the legislature adopt the best possible or fairest allocation of rights and duties, but merely insists that the legislature act reasonably. As it seems very clear to me that the classification at issue here is a rational one, I would affirm the judgment below. In establishing the Commission and giving it the right to levy charges for withdrawals from the river, Congress decided to respect the existing legal rights of various local entities to withdraw water free of charge. The grandfather clause at issue here was enacted to prevent the Commission from charging municipalities such as Philadelphia and New York for continuing to withdraw water in the quantities they were legally sanctioned to withdraw before the Commission was established. The rationale for this provision is amply explicated in the opinion below:

But it seems entirely expectable for Congress to have elected to distinguish between uses of Basin waters legally sanctioned as of 1961 and uses which would arise and seek legal sanction in the future. Congress may well have supposed that, broadly speaking, the Delaware River and its tributaries met the water use needs of the region as of 1961, and that most Commission projects aimed at enlarged and more equitable water allocation would be geared to meeting needs developing after the effective date of the Compact. A "grandfather clause" exempting from charges those uses previously vali-

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NOTE 2 — (Continued)

evident that the resolution directly implements the statutory "grandfather clause." Indeed, the resolution represents a rather grudging interpretation of the statutory exemption. Thus, to the extent we invalidate the resolution, we also, in effect, invalidate the statute.

dated by state law is a reasonable legislative classification wholly consistent with the principles of equal protection.

*Delaware Riv. Basin Comm'n v. Bucks Cty. Water & Sewer Auth.*, 474 F.Supp. 1249, 1255 (E.D. Pa. 1979) (footnote deleted). In brief, at the time the Commission was established, the natural flow of the river was evidently sufficient to meet the needs of the existing users in the amounts they were legally sanctioned to withdraw. Because whatever improvements were later made by the Commission did not benefit these established users, the grandfather clause — exempting these users from charges for withdrawals not in excess of their legal entitlement as of 1961 — was perfectly rational.<sup>3</sup> *Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111, 4114 (U.S. Jan. 21, 1981) (No. 79-1171).

I do not mean to argue that the system adopted is the best or most equitable of all conceivable ways to finance the improvements for the Delaware. Indeed, in my opinion, it would be proper for Philadelphia, a major user of the river's water, to share the cost of any necessary improvements. However, these are concerns properly addressed to the legislature, not to this Court in its role as guardian of the Constitution. I had thought that equal protection scrutiny of purely economic regulations was finally put to rest some years ago in *Ferguson v. Skrupa*, 372 U.S. 726 (1963). See also *Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111, 4114 (U.S. Jan. 21, 1981) (No. 79-1171); *New Orleans v. Dukes*, 427 U.S. 297 (1976)(per curiam). We must be careful not to open the door towards a return to the era in which courts were all too willing to allow their economic opin-

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3. I agree with the majority that it would have been preferable had Congress expressly articulated the purposes(s) of the grandfather clause. However, legislators are very busy people. Thus, it is impractical to insist that Congress provide a justification for every subsection of every statute it passes.



ions to color their judgments about matters of constitutional law. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), overruled, *United States v. Darby*, 312 U.S. 100 (1941).

Interestingly, the majority stops short of entirely invalidating the grandfather scheme. The holding appears to be that the statute is constitutional insofar as it allows prior users, such as Philadelphia, to continue withdrawing water free of charge up to the amount of water they were actually withdrawing in 1961, when the Compact became effective. The majority merely finds the statute unconstitutional in that it exempts prior users from charges to a slightly greater extent — in an amount that is the lesser of (a) the quantity authorized by a valid State permit issued prior to 1961, (b) the physical capacity of the user's system to withdraw water at that time, or (c) the total allocable flow at the point of withdrawal. The record does not reveal the precise figures. What is clear, however, is that today's decision merely invalidates the grandfather clause to a relatively slight degree.<sup>4</sup> To my mind, the constitutional guarantee of equal protection does not draw such nice distinctions. That is particularly true with respect to purely economic regulations, such as that present here. The question of the precise scope of the exemption from charges is a matter properly committed to the judgment of the legislature. Accordingly, I would affirm the judgment below.

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4. The assertion that Philadelphia and other pre-1961 users have no "reliance interest" in amounts in excess of their actual usage in 1961 is subject to dispute. The Commission's regulation would only allow free withdrawals to the extent of the user's pumping capacity in 1961. Obviously, in building their pumping facilities, pre-1961 users legitimately relied on their free access to the Delaware's water to the extent authorized by existing law.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVER BASIN  
COMMISSION

v.

BUCKS COUNTY WATER AND  
SEWER AUTHORITY

and

CITY OF PHILADELPHIA

Civil Action

No. 77-2668

POLLAK, J.

August 29, 1979

In my opinion of July 27, 1979, I granted plaintiff's motion for summary judgment against both defendants, denied defendants' cross-motions for summary judgment, and concluded that, "On the expectation that the parties can reach an agreed calculation of the defendants' dollar liability to the Commission, the parties are directed to submit a draft order reflecting that liability."

No agreed submission has been forthcoming. In lieu thereof:

(1) Plaintiff has submitted a draft order which, *inter alia*, determines that "Defendants are liable to plaintiff, Delaware River Basin Commission in the amount of \$75,336.04 plus \$18,223.15 for late charges for a total of \$95,559.19."

(2) Defendant City of Philadelphia has submitted a draft order which would declare its co-defendant, Bucks County Water and Sewer Authority, "solely liable to plaintiff, Delaware River Basin Commission, in the amount of \$75,336.04 plus \$18,223.15 for late charges for a total of \$93,559.19." The proposed insulation of defendant City of Philadelphia from liability to the plaintiff Commission would, if approved, be inconsistent with the conclusion of law embodied in the opinion

of July 27 that both defendants are liable to plaintiff.<sup>1</sup>

(3) Defendant Bucks County Water and Sewer Authority has not submitted a draft order, but has filed an appeal "from the Opinion directing the parties to submit a Draft Order. . . ."

Since the parties have not managed to submit an agreed form of words for an order effectuating the opinion of July 27, I am this 29th Day of August, concurrently with the filing of this memorandum, entering an order. The dollar liability of \$93,559.19 set forth in the order is the calculation advanced by plaintiff, adopted by defendant City of Philadelphia as the measure of the liability to plaintiff of defendant Bucks County Water and Sewer Authority, and not disputed by the latter defendant.

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Louis H. Pollak

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1. Philadelphia's alternative request for judgment on its cross-claim against Bucks County Water and Sewer Authority appears premature. See footnote 1 of the opinion of July 27. "Philadelphia has not moved for community judgment on its cross-claim against BWSA."

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE RIVER BASIN  
COMMISSION

*v.*

BUCKS COUNTY WATER AND  
SEWER AUTHORITY  
and  
CITY OF PHILADELPHIA

Civil Action

No. 77-2668

**ORDER**

For the reasons stated in the opinion of July 27, 1979 and the memorandum of August 29, 1979: The motion for summary judgment of plaintiff Delaware River Basin Commission is granted insofar as it seeks a declaration that defendant City of Philadelphia and defendant Bucks County Water and Sewer Authority are jointly and severally liable to plaintiff Commission, pursuant to Commission Resolution 74-6, for water charges of \$75,336.04 and late charges of \$18,223.15, constituting an aggregate liability of \$93,559.19, for Delaware River Basin water withdrawn by defendant City of Philadelphia and sold to defendant Bucks County Water and Sewer Authority from May 22, 1974 to June 30, 1979.

In all other respects, plaintiff's motion for summary judgment is denied.

Defendants' cross-motions for summary judgment are denied.

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Louis H. Pollak

August 29, 1979

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DELAWARE RIVER BASIN  
COMMISSION

*v.*

BUCKS COUNTY WATER AND  
SEWER AUTHORITY  
and  
CITY OF PHILADELPHIA

CIVIL ACTION

No. 77-2668

POLLAK, J.

JULY 27, 1979

Plaintiff Delaware River Basin Commission (hereinafter, "Commission") is suing Bucks County Water and Sewer Authority (hereinafter, "BWSA") and the City of Philadelphia to impose its charges for water drawn from the Delaware River by Philadelphia and sold to BWSA. Philadelphia has cross-claimed against BWSA for indemnification if it is held liable to the Commission. The Commission has moved for summary judgment against Philadelphia and BWSA, which in turn have cross-moved for summary judgment against the Commission.<sup>1</sup>

I.

The Commission is an interstate body established under the Delaware River Basin Compact, an interstate compact entered into by New York, New Jersey, Pennsylvania, Delaware, and the United States, and ratified by Congress (75 Stat. 688) pursuant to the Compact Clause of the Constitution, Article I, § 10. The Compact, codified in Pennsylvania at 32 P.S. § 815.101, became effective in 1961. The purpose of the Compact is the management and conservation of water from the Delaware River Basin (the Delaware River and its tributaries).

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1. Philadelphia has not moved for summary judgment on its cross-claim against BWSA.

The Compact authorizes the Commission to impose charges for the use of facilities it owns and operates. Compact § 3.7; 32 P.S. § 815.101(3.7). The Commission may not charge, however, for any water withdrawn from the Basin if the withdrawal "could lawfully have been made without charge on the effective date of the Compact. . . ." Compact § 15.1(b).<sup>2</sup> In 1971, the Commission passed Resolution 71-4, authorizing charges for the use of water from the Delaware River Basin. In 1974, the Commission passed Resolution 74-6, Section 5.1-2 of which provides that a charge for water shall be levied against "[a]ny person, firm, corporation or other entity, including a public corporation, body or agency, who shall use, withdraw or divert surface waters of the [Delaware River] basin."<sup>3</sup> Exempted from these charges are those who use, withdraw or divert water "in quantities not exceeding the legal entitlement of the user, determined as of [the effective date of the Compact]." Resolution 74-6, § 5-1.3(a). Section 5-1.3(b)(1) defines "legal entitlement" in the following manner:

1. "Legal entitlement" means the quantity or volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(i) a valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

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2. This section does not appear in the Pennsylvania codification because it was added by Congress as a condition of federal participation after Pennsylvania's ratification of the Compact. See generally *Borough of Morrisville v. Delaware River Basin Comm'n*, 399 F. Supp. 469, 474 (E.D. Pa. 1975) (Newcomer, J.) *aff'd per curiam*, 532 F.2d 745 (3d Cir. 1976).

3. Cf. Resolution 74-6, § 5-4.1(b): "'Water user' means any person who uses, takes, withdraws or diverts surface waters within the Delaware River Basin."

(ii) physical capability as required for such taking; or

(iii) the total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.<sup>4</sup>

The 1974 Resolution imposed a charge of 4¢ per thousand gallons for surface water consumed by users in the Basin and .04¢ per thousand gallons of surface water taken for nonconsumptive purposes.<sup>5</sup>

In 1966, BWSA and the City of Philadelphia signed an agreement under which Philadelphia was to provide BWSA with 35,000,000 gallons of water per day.<sup>6</sup> This agreement, made before the Commission began charging for water drawn from the Basin, was submitted to the Commission for approval under Section 3.8 of the Compact, 32 P.S. §815.101(3.8), requiring Commission approval of water projects having "a substantial effect on the water resources of the Basin." The Commission's executive director, James F. Wright, responded by letter that no approval was needed under Section 3.8 of the Compact. Philadelphia began delivering water to BWSA in 1970, and has done so continuously since that date, while receiving a stipulated payment.

In late 1976 and early 1977, the Commission wrote

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4. Section 5-1.3 of Resolution 74-6 has been held to be a proper implementation of the mandate of Section 15.1(b) of the Compact. *Borough of Morrisville v. Delaware River Basin Commission*, 399 F. Supp. at 474-75. In this opinion, Judge Newcomer persuasively shows that Section 15.1(b) of the Compact should not be interpreted to require application of the federal common law doctrine of equitable apportionment developed by the Supreme Court to adjudicate water rights disputes between states.

5. These charges have since been increased to 6¢ and .06¢ respectively, but the increase does not affect this litigation.

6. Similar contracts had been signed between Philadelphia and predecessors of BWSA in 1962 and 1964, but it appears that no water was delivered under those contracts.

to Philadelphia and to BWSA, (a) stating that BWSA had no legal entitlement to any water from the Basin of the Commission charge, and (b) requesting that Philadelphia or BWSA remit money owed to the Commission under Resolution 74-6 for the water withdrawn by Philadelphia for BWSA's use. Philadelphia responded that the Commission should pursue BWSA, which was actually receiving the water, and that Philadelphia did not wish to act as a "collection agency" for the Commission. BWSA responded that it owed no money to the Commission, because it was buying water from Philadelphia that Philadelphia had been legally entitled to draw from the Basin free of charge on the effective date of the Compact. The Commission then brought this law suit. The Commission moves for summary judgment, arguing that both defendants are liable to the Commission for the water taken by Philadelphia and sold to BWSA, in that (a) within the meaning of Section 5-1.2 of Resolution 74-6, both defendants "use, withdraw or divert" Delaware River water, and (b) within the meaning of Section 5-1.3 of the Resolution, defendants fell without "the legal entitlement of the user . . ." and hence do not qualify for the exemption from the Commission's water charges mandated by the Compact.

## II.

### A.

The first question to be considered is whether the City of Philadelphia and BWSA "use, withdraw or divert" waters from the Delaware River Basin within the meaning of Section 5.1-2 of Resolution 74-6, *supra*, and Section 5.4-1(b), *supra* note 3. Neither defendant, however, seriously contends that it falls without these provisions. In appropriating water from the Delaware River under its contract with BWSA, Philadelphia "withdraws" and "diverts" those waters within the ordinary meaning of

those words.<sup>7</sup> And in accepting the water from Philadelphia and distributing it to its customers, BWSA "uses" the water within the ordinary meaning of that word.

### B.

Whether either defendant is exempt from the Commission's charges is, as to both defendants, the same question: Since BWSA acknowledges that neither it nor its predecessors ever enjoyed any independent legal entitlement to draw water from the Delaware, BWSA's claim to exemption, like Philadelphia's, rests on the proposition that, as of the effective date of the Compact (October 27, 1961), Philadelphia had "a valid and subsisting permit, issued under the authority of [Pennsylvania]" (Resolution 74-6, §5-1.3(b)(1)(i)) to take water from the Delaware in the quantity and for the purpose comprehended by Philadelphia's agreement with BWSA.

The question of quantity is of no moment. Under a permit issued to Philadelphia by the Pennsylvania Department of Forests and Waters in 1955 and still in force, Philadelphia was, as of 1961, authorized to draw 423,000,000 gallons daily from the Delaware. Even including the 35,000,000 gallons drawn for resale to BWSA, Philadelphia's actual taking of Delaware water has never approached that theoretical maximum.<sup>8</sup>

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7. Philadelphia admits that it withdraws water from the Delaware, but contends that it is merely the conduit by which BWSA obtains water for the use of its customers. Nothing in the Compact or the Resolutions, however, makes Philadelphia exempt from the Commission's charges for this reason.

8. In a separate administrative proceeding, which has no bearing on this law suit, the Commission staff is asserting that, pursuant to Resolution 74-6, §5-1.3(b)(1)(iii), Philadelphia's ceiling entitlement is not the 423,000,000 gallons per day of Delaware water specified in the permit, but an assertedly lower quantity reflecting Philadelphia's intake capacity in 1961. But even that lower number is higher than Philadelphia's actual aggregate draw from the Delaware at any time.

Under another permit issued by the Department of Forests and Waters in 1958, Philadelphia is also entitled to draw up to 285,000,000 gallons daily from the Schuylkill.



Therefore, the real question is whether the 1955 permit authorizing Philadelphia's massive draw of Delaware River water can be said to have contemplated Philadelphia's resale of such water to outlying municipalities. To answer this question of Pennsylvania law, it is necessary briefly to consider the statutory and common law framework within which the permit system of municipal water allocation developed.

The Pennsylvania Supreme Court's opinion in *Philadelphia v. Philadelphia Suburban Water Co.*, 309 Pa. 130, 163 A. 297 (1932), comprehensively describes the Pennsylvania water allocation system which prevailed until 1939. The paramount rights of water users were those of riparian owners to take for domestic use and of the public to sail on navigable streams.<sup>9</sup> *Id.* at 150, 163 A. at 303 (citing cases). The right of municipalities to take water from rivers for the use of the general population was a creature of statute. See *id.* at 145-46, 163 A. at 301; *Philadelphia & Reading R. Co. v. Pottsville Water Co.*, 182 Pa. 418, 38 A. 404 (1897); *Haupt's Appeal*, 125 Pa. 211 (1889).

Philadelphia was explicitly authorized by statute to take water from the Schuylkill. 309 Pa. at 140-42, 163 A. at 299-300. Other municipalities were statutorily authorized to acquire sufficient water for their inhabitants through the power of eminent domain.<sup>10</sup> *Philadelphia & Reading R. Co. v. Pottsville Water Co.*, 182 Pa. at 426, 38 A. at 406 (municipal water company which did not take water rights by eminent domain had no more right to use a stream than any other riparian owner); *Palmer Water Co. v. Leighton Water Supply Co.*, 280 Pa. 492, 124 A. 747 (1924); *Haupt's Appeal*, *supra*. And, most importantly for the current case.

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9. Congress of course retains ultimate authority to regulate navigable waterways, an authority it did not delegate to the Commission. Compact §1.4, 32 P.S. §815.101(1.4).

10. Thus, many of the early cases contain discussions of the eminent domain power.

While a [municipality] has the power to construct a reservoir and conduct water to its inhabitants, it has no right to furnish the water to persons outside the [municipal] limits.

*Stauffer v. East Stroudsburg Borough*, 215 Pa. 143, 144, 64 A. 411 (1906) (Supreme Court adopting opinion of trial court), citing *Haupt's Appeal*, 125 Pa. at 225. Thus, under Pennsylvania law as it stood up to 1939, Philadelphia's entitlement to supply water ended at Philadelphia's borders. *Philadelphia v. Philadelphia Suburban Water Co.*, 309 Pa. at 146, 163 A. at 301.

In 1939, the Pennsylvania Legislature abolished the eminent domain system for municipal water allocation, and vested the allocative authority in a Water and Power Resources Control Board. Act of June 24, 1939, P.L. 842, 32 P.S. 631 *et seq.* In 1955, when Philadelphia's current permit for Delaware River water was issued, the Board was part of the Department of Forests and Waters. See Act of April 9, 1927, P.L. 177, §202, as amended, 71 P.S. 62 (Main vol. 1962). The powers of the Board have since been vested in the Department of Environmental Resources. Act of December 3, 1970, P.L. 177, §1901-A, 71 P.S. §510-1(1) (Supp. 1978). The acquisition of any water rights beyond those possessed by a municipality or municipal authority in 1939 must be carried out in accordance with the Act of 1939, 32 P.S. §§631, 635. When a municipality or municipal authority applies for new water rights, it must set forth, *inter alia*, "The district, municipality or political subdivision, and the population thereof, requiring the supply, and the necessity for acquisition." 32 P.S. §636(3). Under the Act of 1939, the Water and Power Resources Board (now the Department of Environmental Resources) is "the single tribunal to determine questions of the appropriation and diversion of water from the streams of the Commonwealth." *Borough of Collegeville v. Philadelphia Suburban Water Co.*, 377 Pa. 636, 648, 105 A.2d 722,

728 (1954). In making such determination, the Board is required to consider whether "the water rights proposed to be acquired are reasonably necessary for the present purposes and future needs of the agency making application therefor. . . ." *Id.*

Whatever the typical practice prior to 1939, it would appear that, under the statute, the Water and Power Resources Board may well have the authority to approve arrangements, such as the one between Philadelphia and BWSA, by which one municipality provides water to users outside its borders. Yet, Philadelphia's application for the 1955 permit states that the district or municipality requiring the supply of water is the City of Philadelphia. It does not suggest that any water to be taken under the permit was to be made available to water suppliers outside Philadelphia. Nor does the 1955 permit suggest that the Board of Water and Power Resources expected that any water would be so used. Hence, the permit may not be construed as authorizing Philadelphia to divert water from the Delaware River for sale to BWSA.

### III.

BWSA raises several other issues which it asserts require that summary judgment for the Commission be denied.

#### A.

BWSA contends that the Commission's 1966 approval of the agreement between Philadelphia and BWSA bars the Commission from now imposing a charge for the water sold under the agreement. The contention is without merit.

The 1966 letter was issued as certification that the sale of water from Philadelphia to BWSA did not require review under Section 3.8 of the Compact. At the time the letter was issued, the Commission was making no charge for water drawn from the Basin by any municipal

user. A charge for water under Resolution 74-6 is in no sense a disapproval of the project or a rescission of the 1966 letter. Such a charge is simply what it purports to be — a tariff for water taken from the Delaware River Basin, adopted in order to defray the costs of the Commission's activities. The charge may lawfully be imposed unless the taking of water is exempt from charge under the Compact or Resolution 74-6. Neither the Compact nor the Resolution makes imposition of a charge for the use of water depend on whether the particular use will be subject to review under Section 3.8 as having a "substantial effect" upon the water resources of the Basin.

Alternatively, BWSA contends that the proper interpretation of the 1966 letter — whether it was simply intended to certify that the Philadelphia-BWSA agreement required no formal Commission approval under Section 3.8 of the Compact, or whether it was also intended to exempt water drawn under the agreement from all potential Commission charges — is a question of fact precluding the granting of summary judgment. But the text of the letter deals only with exemption from review under Section 3.8. It does not refer to exemption from charges levied by the Commission under Section 3.7 of the Compact. And the record is barren of extrinsic evidence — by way of affidavit or otherwise — which offers any hint that the letter meant more than it said. Further, no authority has been advanced for the proposition that the Executive Director has authority — or even apparent authority — permanently to preclude the Commission from exercising the comprehensive power, vested in it by the Compact, "from time to time after public notice and hearing [to] fix, alter, and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby. . . ." §3.7.

B.

BWSA next contends that the Executive Director's failure to ask BWSA to enter into a water use contract pursuant to Section 5-3.2 of Resolution 74-6 precludes the Commission from now seeking to impose a noncontractual water use charge. Section 5-3.2 provides:

*Contracts; Minimum charge.* Subject to the exclusions for certificates of entitlement and exempt uses, the Executive Director may require contracts for any taking, use, withdrawal or diversion of waters of the basin. Each contract shall provide for a minimum annual payment in accordance with an estimated annual demand schedule, regardless of use, withdrawal or diversion. The failure of any person to execute a contract under this section shall not affect the application of other requirements of this resolution.

The language of this section shows that contracts are one way, but not the exclusive way, in which water charges may be imposed on a water user.

C.

At oral argument, BWSA advanced the proposition that Section 15.1(b) of the Compact, as implemented by Resolution 74-6, violates federal constitutional principles of equal protection in that it exempts from water use charges those public entities which had water permits before 1961 while imposing charges on later users.

Actually, this characterization of the Compact is not entirely apt. If a municipality possessing a pre-Compact permit seeks to draw water from the Basin beyond that permitted by the permit, the additional taking will be subject to the Commission's water use charge. Part II of this opinion holds Philadelphia liable for just such a charge.

The legislative history does not make clear why Congress chose to add Section 15.1(b) to the Compact. See *Borough of Morrisville v. Delaware River Basin Commission*, *supra* note 2. But it seems entirely expectable for Congress to have elected to distinguish between uses of Basin waters legally sanctioned as of 1961 and uses which would arise and seek legal sanction in the future. Congress may well have supposed that, broadly speaking, the Delaware River and its tributaries met the water use needs of the region as of 1961, and that most Commission projects aimed at enlarged and more equitable water allocation<sup>11</sup> would be geared to meeting needs developing after the effective date of the Compact. A "grandfather clause" exempting from charges those uses previously validated by state law is a reasonable legislative classification wholly consistent with the principles of equal protection. See *United States v. Maryland Savings-Share Insurance Corporation*, 400 U.S. 4 (1970).<sup>12</sup>

#### IV.

The Commission's motion for summary judgment is granted against both defendants. The defendants' cross-motions for summary judgment are denied.

The relief sought by the Commission will be granted in major part but not in its entirety. The Commission will be granted monetary relief equal to its charges for water under Resolution 74-6 plus late charges thereunder. The Commission's claim for a pen-

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11. As opposed to water pollution projects, which may be undertaken both "to control potential pollution and abate or dilute existing pollution." Compact §5.1, 32 P.S. §815.101(5.1).

12. The conclusion would be the same whether the challenge is addressed to the signatory states, under the explicit equal protection language of the Fourteenth Amendment, or is addressed to the signatory United States, under the capacious reading of Fifth Amendment due process as comprehending equal protection principles. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

alty, on the ground that BWSA has violated an order of the Commission, pursuant to Section 14.17 of the Compact, is rejected. So too is the Commission's request for a declaratory judgment as to liability for charges imposed by Resolution 74-6; this opinion should suffice as an explanation of the defendants' legal obligation. Nor has the Commission demonstrated a basis in the Compact or in general principles of equity for its requested injunction forbidding Philadelphia from delivering water to BWSA until the latter complies with Resolution 74-6; the legal remedies of the plaintiff here are entirely adequate.

On the expectation that the parties can reach an agreed calculation of the defendants' dollar liability to the Commission, the parties are directed to submit a draft order reflecting that liability.

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Louis H. Pollak

A-72

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 82-1232 and 82-1233

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DELAWARE RIVER BASIN COMMISSION

*v.*

BUCKS COUNTY WATER & SEWER AUTHORITY  
and CITY OF PHILADELPHIA

THE STATE OF NEW YORK; THE STATE OF NEW  
JERSEY; THE COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL RESOURCES;  
WESTERN BERKS WATER AUTHORITY;  
BETHLEHEM STEEL and BETHLEHEM  
MINES CORPORATION; G&W NATURAL  
RESOURCES GROUP; PHILADELPHIA SUBURBAN  
WATER COMPANY; CITIZENS UTILITIES HOME  
WATER COMPANY; PUBLICKER INDUSTRIES,  
INC.; PHILADELPHIA GAS WORKS; UNITED  
STATES STEEL CORPORATION; NORTHAMPTON  
BOROUGH MUNICIPAL AUTHORITY

Intervenors

*Western Berks Water Authority,  
Appellant in No. 82-1232*

*Bucks County Water and Sewer Authority,  
Appellant in No. 82-1233*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 77-2668)

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Argued December 14, 1982

Before HUNTER, GARTH, *Circuit Judges*,  
and WEBER,\* *District Judge*

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\* Honorable Gerald J. Weber, United States District Judge for the  
Western District of Pennsylvania, sitting by designation.



JUDGMENT ORDER

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Bucks County Water and Sewer Authority and Western Berks Water Authority appeal from an order of the District Court for the Eastern District of Pennsylvania granting summary judgment in favor of plaintiff Delaware River Basin Commission and other plaintiff-intervenors. Appellants argue that the district court improperly determined that Resolution 74-5 did not violate the equal protection guarantees of the Federal Constitution. Appellants also argue that the district court erred in resolving this action by summary judgment. After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

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James Hunter, III, *Circuit Judge*

ATTEST:

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Sally Mrvos, *Clerk*

Date: January 6, 1983

A-74

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 82-1232 and 82-1233

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DELAWARE RIVER BASIN COMMISSION, et al,  
*Appellees*

*v.*

BUCKS COUNTY WATER AND SEWER  
AUTHORITY, et al,  
*Appellants*

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SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*,  
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,  
HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*

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The petition for rehearing filed by  
BUCKS COUNTY WATER AND  
SEWER AUTHORITY

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

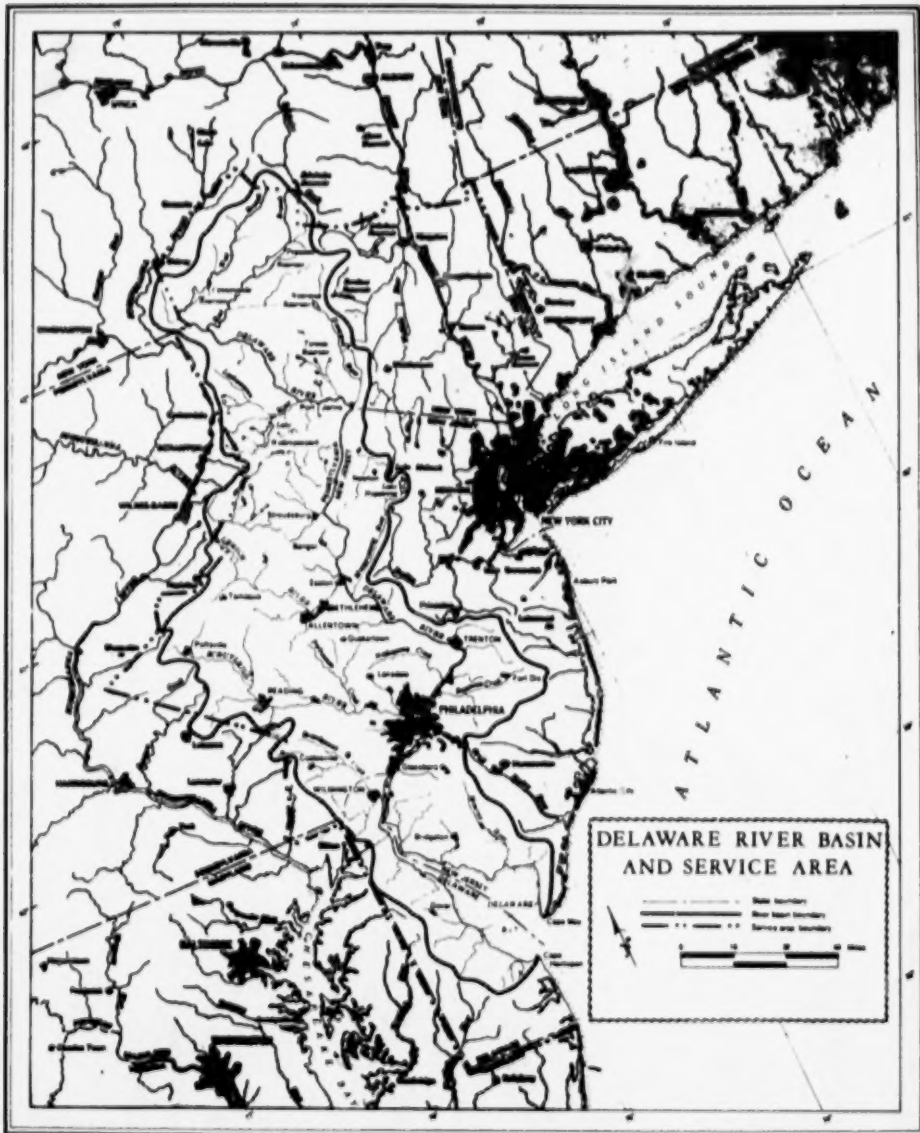
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*Judge*

Dated: February 1, 1983

# DELAWARE RIVER BASIN COMPACT





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# **DELAWARE RIVER BASIN COMPACT**

Published by the  
Delaware River Basin Commission  
January 1967

Copies of this compact may be obtained from the office of the  
Delaware River Basin Commission, 25 Scotch Road,  
Trenton, New Jersey

DELAWARE RIVER BASIN COMMISSION\*

Malcolm Wilson  
Governor of New York

Brendan T. Byrne  
Governor of New Jersey

Ronald W. Pedersen, *Alternate*

David J. Bardin, *Alternate*

\* \* \*

\* \* \*

Sherman W. Tribbitt  
Governor of Delaware

Milton J. Shapp  
Governor of Pennsylvania

John C. Bryson, *Alternate*

Maurice K. Goddard, *Alternate*  
Carmen F. Guarino, *Advisor*

\* \* \*

Rogers C. B. Morton  
Secretary of the Interior  
Appointed by the President

Thomas F. Schweigert, *Alternative*

Col. C. A. Selleck, *Advisor*

\* \* \*

James F. Wright  
Executive Director

W. Brinton Whittall  
Secretary

William Miller  
General Counsel

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## DELAWARE RIVER BASIN COMPACT

*United States: Public Law 87-328, Approved September 27, 1961, 75 Statutes at Large 688.*

*Delaware: 53 Delaware Laws, Chapter 71, Approved May 26, 1961.*

*New Jersey: Laws of 1961, Chapter 13, Approved May 1, 1961.*

*New York: Laws of 1961, Chapter 148, Approved March 17, 1961.*

*Pennsylvania: Acts of 1961, Act No. 268, Approved July 7, 1961.*

### PART I

#### COMPACT

Whereas the signatory parties recognize the water and related resources of the Delaware River Basin as regional assets vested with local, State, and National interests, for which they have a joint responsibility; and

Whereas the conservation, utilization, development, management, and control of the water and related resources of the Delaware River Basin under a comprehensive multipurpose plan will bring the greatest benefits and produce the most efficient service in the public welfare; and

Whereas such a comprehensive plan administered by a basin-wide agency will provide effective flood damage reduction; conservation and development of ground and surface water supply for municipal, industrial, and agricultural uses; development of recreational facilities in relation to reservoirs, lakes, and streams; propagation of fish and game; promotion of related forestry, soil conservation, and watershed projects; protection and aid to fisheries dependent upon water resources; development of hydroelectric power potentialities; improved navigation; control of the movement of salt water; abatement and control of stream pollution; and regulation of stream flows toward the attainment of these goals; and

Whereas decisions of the United States Supreme Court relating to the waters of the basin have confirmed the interstate regional character of the water resources of the Delaware River Basin, and the United States Corps of Engineers has in a prior report on the Delaware River Basin (House Document 179, Seventy-third Congress, second session) officially recognized the need for an interstate agency and the economies that can result from unified development and control of the water resources of the basin; and

Whereas the water resources of the basin are presently subject to the duplicating, overlapping, and uncoordinated administration of some forty-three State agencies, fourteen interstate agencies, and nineteen Federal agencies which exercise a multiplicity of powers and duties resulting in a splintering of authority and responsibilities; and

Whereas the joint advisory body known as the Interstate Commission on the Delaware River Basin (INCodel), created by the respective commissions or Committee on Interstate Cooperation of the States of Delaware, New Jersey, New York, and Pennsylvania, has on the basis of its extensive investigations, surveys, and studies concluded that regional development of the Delaware River Basin is feasible, advisable, and urgently needed; and has recommended that an interstate compact with Federal participation be consummated to this end; and

Whereas the Congress of the United States and the executive branch of the Government have recognized the national interest in the Delaware River Basin by authorizing and directing the Corps of Engineers, Department of the Army, to make a comprehensive survey and report on the water and related resources of the Delaware River Basin, enlisting the technical aid and planning participation of many Federal, State, and municipal agencies dealing with the waters of the basin, and in particular the Federal Departments of Agriculture, Commerce, Health, Education, and Welfare, and Interior, and the Federal Power Commission; and

Whereas some twenty-two million people of the United States at present live and work in the region of the Delaware River Basin and its environs, and the government, employment, industry, and economic development of the entire region and the health, safety, and general welfare of its population are and will continue to be vitally affected by the use, conserva-

tion, management, and control of the water and related resources of the Delaware River Basin; and

Whereas demands upon the waters and related resources of the basin are expected to mount rapidly because of the anticipated increase in the population of the region projected to reach thirty million by 1980 and forty million by 2010, and because of the anticipated increase in industrial growth projected to double by 1980; and

Whereas water resources planning and development is technical, complex, and expensive, and has often required fifteen to twenty years from the conception to the completion of a large dam and reservoir; and

Whereas the public interest requires that facilities must be ready and operative when needed, to avoid the catastrophe of unexpected floods or prolonged drought, and for other purposes; and

Whereas the Delaware River Basin Advisory Committee, a temporary body constituted by the Governors of the four basin States and the mayors of the cities of New York and Philadelphia, has prepared a draft of an interstate-Federal compact for the creation of a basin agency, and the signatory parties desire to effectuate the purposes thereof: Now therefore

The states of Delaware, New Jersey and New York and the Commonwealth of Pennsylvania, and the United States of America hereby solemnly covenant and agree with each other, upon the enactment of concurrent legislation by the Congress of the United States and by the respective state legislatures, having the same effect as this Part, to the following Compact:

## ARTICLE 1

### SHORT TITLE, DEFINITIONS, PURPOSE AND LIMITATIONS

**Section 1.1 Short title.** This Act shall be known and may be cited as the Delaware River Basin Compact.

**1.2 Definitions.** For the purposes of this compact, and of any supplemental or concurring legislation enacted pursuant thereto, except as may be otherwise required by the context:

(a) "Basin" shall mean the area of drainage into the Delaware River and its tributaries, including Delaware Bay;

(b) "Commission" shall mean the Delaware River Basin Commission created and constituted by this compact;

(c) "Compact" shall mean Part I of this act;

(d) "Cost" shall mean direct and indirect expenditures, commitment, and net induced adverse effects, whether or not compensated for, used or incurred in connection with the establishment, acquisition, construction, maintenance and operation of a project;

(e) "Facility" shall mean any real or personal property, within or without the basin, and improvements thereof or thereon, and any and all rights of way, water, water rights, plants, structures, machinery and equipment, acquired, constructed, operated or maintained for the beneficial use of water resources or related land uses including, without limiting the generality of the foregoing, any and all things and appurtenances necessary, useful or convenient for the control, collection, storage, withdrawal, diversion, release, treatment, transmission, sale or exchange of water; or for navigation thereon, or the development and use of hydroelectric energy and power, and public recreational facilities; or the propagation of fish and wildlife; or to conserve and protect the water resources of the basin or any existing or future water supply source, or to facilitate any other uses of any of them;

(f) "Federal government" shall mean the government of the United States of America, and any appropriate branch, department, bureau or division thereof, as the case may be;

(g) "Project" shall mean any work, service or activity which is separately planned, financed, or indentified by the commission, or any separate facility undertaken or to be undertaken within a specified area, for the conservation, utilization, control, development or management of water resources which can be established and utilized independently or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation;

(h) "Signatory party" shall mean a state or commonwealth party to this compact, and the federal government;

(i) "Water resources" shall include water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control.

**1.3 Purpose and Findings.** The legislative bodies of the respective signatory parties hereby find and declare:

(a) The water resources of the basin are affected with a local, state, regional and national interest and their planning, conservation, utilization, development, management and control, under appropriate arrangements for intergovernmental cooperation, are public purposes of the respective signatory parties.

(b) The water resources of the basin are subject to the sovereign right and responsibility of the signatory parties, and it is the purpose of this compact to provide for a joint exercise of such powers of sovereignty in the common interests of the people of the region.

(c) The water resources of the basin are functionally inter-related, and the uses of these resources are interdependent. A single administrative agency is therefore essential for effective and economical direction, supervision and coordination of efforts and programs of federal, state and local governments and of private enterprise.

(d) The water resources of the Delaware River Basin, if properly planned and utilized, are ample to meet all presently projected demands, including existing and added diversions in future years and ever increasing economies and efficiencies in the use and reuse of water resources can be brought about by comprehensive planning, programming and management.

(e) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principal of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.

**1.4 Powers of Congress; Withdrawal.** Nothing in this compact shall be construed to relinquish the functions, powers or duties of the Congress of the United States with respect to the control of any navigable waters within the basin, nor shall any provision hereof be construed in derogation of any of the constitutional powers of the Congress to regulate commerce among the states and with foreign nations. The power and right of the



Congress to withdraw the federal government as a party to this compact or to revise or modify the terms, conditions and provisions under which it may remain a party by amendment, repeal or modification of any federal statute applicable thereto is recognized by the signatory parties.

**1.5 Existing Agencies; Construction.** It is the purpose of the signatory parties to preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent not inconsistent with the compact, and the commission is authorized and directed to utilize and employ such offices and agencies for the purpose of this compact to the fullest extent it finds feasible and advantageous.

#### **1.6 Duration of Compact.**

(a) The duration of this compact shall be for an initial period of 100 years from its effective date, and it shall be continued for additional periods of 100 years if not later than 20 years nor sooner than 25 years prior to the determination of the initial period or any succeeding period none of the signatory states, by authority of an act of its legislature, notifies the commission of intention to terminate the compact at the end of the then current 100 year period.

(b) In the event that this compact should be terminated by operation of paragraph (a) above, the commission shall be dissolved, its assets and liabilities transferred, and its corporate affairs wound up, in such manner as may be provided by act of the Congress.

### **ARTICLE 2**

#### **ORGANIZATION AND AREA**

**Section 2.1 Commission Created.** The Delaware River Basin Commission is hereby created as a body politic and corporate, with succession for the duration of this compact, as an agency and instrumentality of the governments of the respective signatory parties.

**2.2 Commission Membership.** The commission shall consist of the Governors of the signatory states, ex officio, and one commissioner to be appointed by the President of the United States to serve during the term of office of the President.

**2.3 Alternates.** Each member of the commission shall appoint an alternate to act in his place and stead, with authority to attend all meetings of the commission, and with power to vote in



the absence of the member. Unless otherwise provided by law of the signatory party for which he is appointed, each alternate shall serve during the term of the member appointing him, subject to removal at the pleasure of the member. In the event of a vacancy in the office of alternate, it shall be filled in the same manner as an original appointment for the unexpired term only.

**2.4 Compensation.** Members of the commission and alternates shall serve without compensation but may be reimbursed for necessary expenses incurred in and incident to the performance of their duties.

**2.5 Voting Power.** Each member shall be entitled to one vote on all matters which may come before the commission. No action of the commission shall be taken at any meeting unless a majority of the membership shall vote in favor thereof.

**2.6 Organization and Procedure.** The commission shall provide for its own organization and procedure, and shall adopt rules and regulations governing its meetings and transactions. It shall organize annually by the election of a chairman and vice-chairman from among its members. It shall provide by its rules for the appointment by each member in his discretion of an advisor to serve without compensation, who may attend all meetings of the commission and its committees.

**2.7 Jurisdiction of the Commission.** The commission shall have, exercise and discharge its functions, powers and duties within the limits of the basin, except that it may in its discretion act outside the basin whenever such action may be necessary or convenient to effectuate its powers or duties within the basin, or to sell or dispose of water, hydroelectric power or other water resources within or without the basin. The commission shall exercise such power outside the basin only upon the consent of the state in which it proposes to act.

### ARTICLE 3

#### POWERS AND DUTIES OF THE COMMISSION

**Section 3.1 Purpose and Policy.** The commission shall develop and effectuate plans, policies and projects relating to the water resources of the basin. It shall adopt and promote uniform and coordinated policies for water conservation, control, use and management in the basin. It shall encourage the planning, development and financing of water resources projects according to such plans and policies.

**3.2 Comprehensive Plan, Program and Budgets.** The commission shall, in accordance with Article 13 of this compact, formulate and adopt:

(a) A comprehensive plan, after consultation with water users and interested public bodies, for the immediate and long range development and uses of the water resources of the basin;

(b) A water resources program, based upon the comprehensive plan, which shall include a systematic presentation of the quantity and quality of water resources needs of the area to be served for such reasonably foreseeable period as the commission may determine, balanced by existing and proposed projects required to satisfy such needs, including all public and private projects affecting the basin, together with a separate statement of the projects proposed to be undertaken by the commission during such period; and

(c) An annual current expense budget, and an annual capital budget consistent with the water resources program covering the commission's projects and facilities for the budget period.

**3.3 Allocations, Diversions and Releases.** The commission shall have the power from time to time as need appears, in accordance with the doctrine of equitable apportionment, to allocate the waters of the basin to and among the states signatory to this compact and to and among their respective political subdivisions, and to impose conditions, obligations and release requirements related thereto, subject to the following limitations:

(a) The commission, without the unanimous consent of the parties to the United States Supreme Court decree in *New Jersey v. New York*, 347 U.S. 995 (1954), shall not impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations, and provisions for the administration thereof as provided in said decree; provided, however, that after consultation with the river master under said decree the commission may find and declare a state of emergency resulting from a drought or catastrophe and it may thereupon by unanimous consent of its members authorize and direct an increase or decrease in any allocation or diversion permitted or releases required by the decree, in such manner and for such limited time as may be necessary to meet such an emergency condition.

(b) No allocation of waters hereafter made pursuant to this section shall constitute a prior appropriation of the waters of

the basin or confer any superiority of right in respect to the use of those waters, nor shall any such action be deemed to constitute an apportionment of the waters of the basin among the parties hereto: *Provided*, That this paragraph shall not be deemed to limit or restrict the power of the commission to enter into covenants with respect to water supply, with a duration not exceeding the life of this compact, as it may deem necessary for a benefit or development of the water resources of the basin.

(c) Any proper party deeming itself aggrieved by action of the commission with respect to an out-of-basin diversion or compensating releases in connection therewith, notwithstanding the powers delegated to the commission by this compact may invoke the original jurisdiction of the United States Supreme Court within one year after such action for an adjudication and determination thereof de novo. Any other action of the commission pursuant to this section shall be subject to judicial review in any court of competent jurisdiction.

**3.4 Supreme Court Decree; Waivers.** Each of the signatory states and their respective political subdivisions, in consideration of like action by the others, and in recognition of reciprocal benefits, hereby waives and relinquishes for the duration of this compact any right, privilege or power it may have to apply for any modification of the terms of the decree of the United States Supreme Court in *New Jersey v. New York*, 347 U.S. 995 (1954) which would increase or decrease the diversions authorized or increase or decrease the releases required thereunder, except that a proceeding to modify such decree to increase diversions or compensating releases in connection with such increased diversions may be prosecuted by a proper party to effectuate rights, powers, duties and obligations under Section 3.3 of this compact, and except as may be required to effectuate the provisions of paragraphs IIIB3 and VB of said decree.

**3.5 Supreme Court Decree; Specific Limitations on Commission.** Except as specifically provided in Sections 3.3 and 3.4 of this article, nothing in this compact shall be construed in any way to impair, diminish or otherwise adversely affect the rights, powers, privileges, conditions and obligations contained in the decree of the United States Supreme Court in *New Jersey v. New York*, 347 U.S. 995 (1954). To this end, and without limitation thereto, the commission shall not:

(a) Acquire, construct or operate any project or facility or make any order or take any action which would impede or inter-

fere with the rights, powers, privileges, conditions or obligations contained in said decree;

(b) Impose or collect any fee, charge or assessment with respect to diversions of waters of the basin permitted by said decree;

(c) Exercise any jurisdiction, except upon consent of all the parties to said decree, over the planning, design, construction, operation or control of any projects, structures or facilities constructed or used in connection with withdrawals, diversions and releases of waters of the basin authorized by said decree or of the withdrawals, diversions or releases to be made thereunder; or

(d) Serve as river master under said decree, except upon consent of all the parties thereto.

**3.6 General Powers.** The commission may:

(a) Plan, design, acquire, construct, reconstruct, complete, own, improve, extend, develop, operate and maintain any and all projects, facilities, properties, activities and services, determined by the commission to be necessary, convenient or useful for the purposes of this compact;

(b) Establish standards of planning, design and operation of all projects and facilities in the basin which affect its water resources, including without limitation thereto water and waste treatment plants, stream and lake recreational facilities, trunk mains for water distribution, local flood protection works, small watershed management programs, and ground water recharging operations;

(c) Conduct and sponsor research on water resources, their planning, use, conservation, management, development, control and protection, and the capacity, adaptability and best utility of each facility thereof, and collect, compile, correlate, analyze, report and interpret data on water resources and uses in the basin, including without limitation thereto the relation of water to other resources, industrial water technology, ground water movement, relation between water price and water demand, and general hydrological conditions;

(d) Compile and coordinate systematic stream stage and ground water level forecasting data, and publicize such information when and as needed for water uses, flood warning, quality maintenance or other purposes;

(e) Conduct such special ground water investigations tests, and operations and compile such data relating thereto as may be required to formulate and administer the comprehensive plan;

(f) Prepare, publish and disseminate information and reports with respect to the water problems of the basin and for the presentation of the needs, resources and policies of the basin to executive and legislative branches of the signatory parties;

(g) Negotiate for such loans, grants, services or other aids as may be lawfully available from public or private sources to finance or assist in effectuating any of the purposes of this compact; and to receive and accept such aid upon such terms and conditions, and subject to such provisions for repayment as may be required by federal or state law or as the commission may deem necessary or desirable;

(h) Exercise such other and different powers as may be delegated to it by this compact or otherwise pursuant to law, and have and exercise all powers necessary or convenient to carry out its express powers or which may be reasonably implied therefrom.

**3.7 Rates and Charges.** The commission may from time to time after public notice and hearing fix, alter and revise rates, rentals, charges and tolls and classifications thereof, for the use of facilities which it may own or operate and for products and services rendered thereby, without regulation or control by any department, office or agency of any signatory party.

**3.8 Referral and Review.** No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. The commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan. The commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section. Any determination of the commission hereunder shall be subject to judicial review in any court of competent jurisdiction.

**3.9 Coordination and Cooperation.** The commission shall promote and aid the coordination of the activities and programs of federal, state, municipal and private agencies concerned with water resources administration in the basin. To this end, but without limitation thereto, the commission may:

(a) Advise, consult, contract, financially assist, or otherwise cooperate with any and all such agencies;

(b) Employ any other agency or instrumentality of any of the signatory parties or of any political subdivision thereof, in the design, construction, operation and maintenance of structures, and the installation and management of river control systems, or for any other purpose;

(c) Develop and adopt plans and specifications for particular water resources projects and facilities which so far as consistent with the comprehensive plan incorporate any separate plans of other public and private organizations operating in the basin, and permit the decentralized administration thereof;

(d) Qualify as a sponsoring agency under any federal legislation heretofore or hereafter enacted to provide financial or other assistance for the planning, conservation, utilization, development, management or control of water resources.

**3.10 Advisory Committees.** The commission may constitute and empower advisory committees, which may be comprised of representatives of the public and of federal, state, county and municipal governments, water resources agencies, water-using industries, water-interest groups, labor and agriculture.

## ARTICLE 4

### WATER SUPPLY

**Section 4.1 Generally.** The commission shall have power to develop, implement and effectuate plans and projects for the use of the water of the basin for domestic, municipal, agricultural and industrial water supply. To this end, without limitation thereto, it may provide for, construct, acquire, operate and maintain dams, reservoirs and other facilities for utilization of surface and ground water resources, and all related structures, appurtenances and equipment on the river and its tributaries and at such off-river sites as it may find appropriate, and may regulate and control the use thereof.



#### **4.2 Storage and Release of Waters.**

(a) The commission shall have power to acquire, operate and control projects and facilities for the storage and release of waters, for the regulation of flows and supplies of surface and ground waters of the basin, for the protection of public health, stream quality control, economic development, improvement of fisheries, recreation, dilution and abatement of pollution, the prevention of undue salinity and other purposes.

(b) No signatory party shall permit any augmentation of flow to be diminished by the diversion of any water of the basin during any period in which waters are being released from storage under the direction of the commission for the purpose of augmenting such flow, except in cases where such diversion is duly authorized by this compact, or by the commission pursuant thereto, or by the judgment, order or decree of a court of competent jurisdiction.

**4.3 Assessable Improvements.** The commission may undertake to provide stream regulation in the main stream or any tributary in the basin and may assess on an annual basis or otherwise the cost thereof upon water users or any classification of them specially benefited thereby to a measurable extent, provided that no such assessment shall exceed the actual benefit to any water user. Any such assessment shall follow the procedure prescribed by law for local improvement assessments and shall be subject to judicial review in any court of competent jurisdiction.

**4.4 Coordination.** Prior to entering upon the execution of any project authorized by this article, the commission shall review and consider all existing rights, plans and programs of the signatory parties, their political subdivisions, private parties, and water users which are pertinent to such project, and shall hold a public hearing on each proposed project.

**4.5 Additional Powers.** In connection with any project authorized by this article, the commission shall have power to provide storage, treatment, pumping and transmission facilities, but nothing herein shall be construed to authorize the commission to engage in the business of distributing water.

## ARTICLE 5

## POLLUTION CONTROL

**Section 5.1 General Powers.** The commission may undertake investigations and surveys, and acquire, construct, operate and maintain projects and facilities to control potential pollution and abate or dilute existing pollution of the water resources of the basin. It may invoke as complainant the power and jurisdiction of water pollution abatement agencies of the signatory parties.

**5.2 Policy and Standards.** The commission may assume jurisdiction to control future pollution and abate existing pollution in the waters of the basin, whenever it determines after investigation and public hearing upon due notice that the effectuation of the comprehensive plan so requires. The standard of such control shall be that pollution by sewage or industrial or other waste originating within a signatory state shall not injuriously affect waters of the basin as contemplated by the comprehensive plan. The commission, after such public hearing may classify the waters of the basin and establish standards of treatment of sewage, industrial or other waste, according to such classes including allowance for the variable factors of surface and ground waters, such as size of the stream, flow, movement, location, character, self-purification, and usage of the waters affected. After such investigation, notice and hearing the commission may adopt and from time to time amend and repeal rules, regulations and standards to control such future pollution and abate existing pollution, and to require such treatment of sewage, industrial or other waste within a time reasonable for the construction of the necessary works, as may be required to protect the public health or to preserve the waters of the basin for uses in accordance with the comprehensive plan.

**5.3 Cooperative Legislation and Administration.** Each of the signatory parties covenants and agrees to prohibit and control pollution of the waters of the basin according to the requirements of this compact and to cooperate faithfully in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the basin which flow through, under, into or border upon any of such signatory states, and in order to effect such object, agrees to enact any necessary legisla-



tion to enable each such party to place and maintain the waters of said basin in a satisfactory condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits and adaptable to such other uses as may be provided by the comprehensive plan.

**5.4 Enforcement.** The commission may, after investigation and hearing, issue an order or orders upon any person or public or private corporation, or other entity, to cease the discharge of sewage, industrial or other waste into waters of the basin which it determines to be in violation of such rules and regulations as it shall have adopted for the prevention and abatement of pollution. Any such order or orders may prescribe the date, including a reasonable time for the construction of any necessary works, on or before which such discharge shall be wholly or partially discontinued, modified or treated, or otherwise conformed to the requirements of such rules and regulations. Such order shall be reviewable in any court of competent jurisdiction. The courts of the signatory parties shall have jurisdiction to enforce against any person, public or private corporation, or other entity, any and all provisions of this article or of any such order. The commission may bring an action in its own name in any such court of competent jurisdiction to compel compliance with any provision of this article, or any rule or regulation issued pursuant thereto or of any such order, according to the practice and procedure of the court.

**5.5 Further Jurisdiction.** Nothing in this compact shall be construed to repeal, modify or qualify the authority of any signatory party to enact any legislation or enforce any additional conditions and restrictions to lessen or prevent the pollution of waters within its jurisdiction.

## ARTICLE 6

### FLOOD PROTECTION

**Section 6.1 General Powers.** The commission may plan, design, construct and operate and maintain projects and facilities, as it may deem necessary or desirable for flood damage reduction. It shall have power to operate such facilities and to store and release waters on the Delaware River and its tributaries and elsewhere within the basin, in such manner, at such

times, and under such regulations as the commission may deem appropriate to meet flood conditions as they may arise.

### **6.2 Flood Plain Zoning.**

(a) The commission shall have power to adopt, amend and repeal recommended standards, in the manner provided by this section, relating to the nature and extent of the uses of land in areas subject to flooding by waters of the Delaware River and its tributaries. Such standards shall not be deemed to impair or restrict the power of the signatory parties or their political subdivisions to adopt zoning and other land use regulations not inconsistent therewith.

(b) The commission may study and determine the nature and extent of the flood plains of the Delaware River and its tributaries. Upon the basis of such studies, it may establish encroachment lines and delineate the areas subject to flood, including a classification of lands with reference to relative risk of flood and the establishment of standards for flood plain use which will safeguard the public health, safety and property. Prior to the adoption of any standards delineating such area or defining such use, the commission shall hold public hearings, in the manner provided by Article 14, with respect to the substance of such standards. At or before such public hearings the proposed standards shall be available, and all interested persons shall be given an opportunity to be heard thereon at the hearing. Upon the adoption and promulgation of such standards, the commission may enter into agreements to provide technical and financial aid to any municipal corporation for the administration and enforcement of any local land use ordinances or regulations giving effect to such standards.

**6.3 Flood Lands Acquisition.** The commission shall have power to acquire the fee or any lesser interest in lands and improvements thereon within the area of a flood plain for the purpose of restricting the use of such property so as to minimize the flood hazard, converting property to uses appropriate to flood plain conditions, or preventing unwarranted constrictions that reduce the ability of the river channel to carry flood water. Any such action shall be in accord with the standards adopted and promulgated pursuant to Section 6.2.

**6.4 Flood and Stream Stage Warnings and Posting.** The commission may cause lands particularly subject to flood to be posted with flood hazard warnings, and may from time to time cause flood advisory notices to be published and circulated as conditions may warrant.

## ARTICLE 7

## WATERSHED MANAGEMENT

**Section 7.1 Watersheds Generally.** The commission shall promote sound practices of watershed management in the basin, including projects and facilities to retard runoff and waterflow and prevent soil erosion.

**7.2 Soil Conservation and Forestry.** The commission may acquire, sponsor or operate facilities and projects to encourage soil conservation, prevent and control erosion, and to promote land reclamation and sound forestry practices.

**7.3 Fish and Wildlife.** The commission may acquire, sponsor or operate projects and facilities for the maintenance and improvement of fish and wildlife habitats related to the water resources of the basin.

**7.4 Cooperative Planning and Operation.**

(a) The commission shall cooperate with the appropriate agencies of the signatory parties and with other public and private agencies in the planning and effectuation of a coordinated program of facilities and projects authorized by this article.

(b) The commission shall not operate any such project or facility unless it has first found and determined that no other suitable unit or agency of government is available to operate the same upon reasonable conditions, in accordance with the intent and purpose expressed in Section 1.5 of this compact.

## ARTICLE 8

## RECREATION

**Section 8.1 Development.** The commission shall provide for the development of water related public sports and recreational facilities. The commission on its own account or in cooperation with a signatory party, political subdivision or any agency thereof, may provide for the construction, maintenance and administration of such facilities, subject to the provisions of Section 8.2 hereof.

**8.2 Cooperative Planning and Operation.**

(a) The commission shall cooperate with the appropriate agencies of the signatory parties and with other public and

private agencies in the planning and effectuation of a coordinated program of facilities and projects authorized by this article.

(b) The commission shall not operate any such project or facility unless it has first found and determined that no other suitable unit or agency of government is available to operate the same upon reasonable conditions, in accordance with the intent and purpose expressed in Section 1.5 of this compact.

**8.3 Operation and Maintenance.** The commission, within limits prescribed by this article, shall:

(a) Encourage activities of other public agencies having water related recreational interests and assist in the coordination thereof;

(b) Recommend standards for the development and administration of water related recreational facilities;

(c) Provide for the administration, operation and maintenance of recreational facilities owned or controlled by the commission and for the letting and supervision of private concessions in accordance with this article.

**8.4 Concessions.** The commission shall after notice and public hearing provide by regulation for the award of contracts for private concessions in connection with recreational facilities, including any renewal or extension thereof, upon sealed competitive bids after public advertisement therefor.

## ARTICLE 9

### HYDROELECTRIC POWER

**Section 9.1 Development.** The waters of the Delaware River and its tributaries may be impounded and used by or under authority of the commission for the generation of hydroelectric power and hydroelectric energy, in accordance with the comprehensive plan.

**9.2 Power Generation.** The commission may develop and operate, or authorize to be developed and operated, dams and related facilities and appurtenances for the purpose of generating hydroelectric power and hydroelectric energy.

**9.3 Transmission.** The commission may provide facilities for the transmission of hydroelectric power and hydroelectric energy produced by it where such facilities are not otherwise available upon reasonable terms, for the purpose of wholesale marketing

of power and nothing herein shall be construed to authorize the commission to engage in the business of direct sale to consumers.

**9.4 Development Contracts.** The commission may after public notice and hearing enter into contracts on reasonable terms, consideration and duration under which public utilities or public agencies may develop hydroelectric power and hydroelectric energy through the use of dams, related facilities and appurtenances.

**9.5 Rates and Charges.** Rates and charges fixed by the commission for power which is produced by its facilities shall be reasonable, nondiscriminatory, and just.

## ARTICLE 10

### REGULATION OF WITHDRAWALS AND DIVERSIONS

**Section 10.1 Power of Regulation.** The commission may regulate and control withdrawals and diversions from surface waters and ground waters of the basin, as provided by this article. The commission may enter into agreements with the signatory parties relating to the exercise of such power or regulation or control and may delegate to any of them such powers of the commission as it may deem necessary or desirable.

**10.2 Determination of Protected Areas.** The commission may from time to time after public hearing upon due notice determine and delineate such areas within the basin wherein the demands upon supply made by water users have developed or threaten to develop to such a degree as to create a water shortage or to impair or conflict with the requirements or effectuation of the comprehensive plan, and any such areas may be designated as "protected areas." The commission, whenever it determines that such shortage no longer exists, shall terminate the protected status of such area and shall give public notice of such termination.

**10.3 Withdrawal Permits.** In any protected areas so determined and delineated, no person, firm, corporation or other entity shall divert or withdraw water for domestic, municipal, agricultural or industrial uses in excess of such quantities as the commission may prescribe by general regulation, except (i) pursuant to a permit granted under this article, or (ii) pursuant to a permit or approval heretofore granted under the laws of any of the signatory states.

**10.4 Emergency.** In the event of a drought or other condition which may cause an actual and immediate shortage of available water supply within the basin, or within any part thereof, the commission may, after public hearing, determine and delineate the area of such shortage and declare a water supply emergency therein. For the duration of such emergency as determined by the commission no person, firm, corporation or other public or private entity shall divert or withdraw water for any purpose, in excess of such quantities as the commission may prescribe by general regulation or authorize by special permit granted hereunder.

**10.5 Standards.** Permits shall be granted, modified or denied as the case may be so as to avoid such depletion of the natural stream flows and ground waters in the protected area or in an emergency area as will adversely affect the comprehensive plan or the just and equitable interests and rights of other lawful users of the same source, giving due regard to the need to balance and reconcile alternative and conflicting uses in the event of an actual or threatened shortage of water of the quality required.

**10.6 Judicial Review.** The determinations and delineations of the commission pursuant to Section 10.2 and the granting, modification or denial of permits pursuant to Section 10.3 through 10.5 shall be subject to judicial review in any court of competent jurisdiction.

**10.7 Maintenance of Records.** Each state shall provide for the maintenance and preservation of such records of authorized diversions and withdrawals and the annual volume thereof as the commission shall prescribe. Such records and supplementary reports shall be furnished to the commission at its request.

**10.8 Existing State Systems.** Whenever the commission finds it necessary or desirable to exercise the powers conferred by this article any diversion or withdrawal permits authorized or issued under the laws of any of the signatory states shall be superseded to the extent of any conflict with the control and regulation exercised by the commission.



ARTICLE 11

INTERGOVERNMENTAL RELATIONS

**Section 11.1 Federal Agencies and Projects.** For the purposes of avoiding conflicts of jurisdiction and of giving full effect to the commission as a regional agency of the signatory parties, the following rules shall govern federal projects affecting the water resources of the basin, subject in each case to the provisions of Section 1.4 of this compact:

(a) The planning of all projects related to powers delegated to the commission by this compact shall be undertaken in consultation with the commission;

(b) No expenditure or commitment shall be made for or on account of the construction, acquisition or operation of any project or facility nor shall it be deemed authorized, unless it shall have first been included by the commission in the comprehensive plan;

(c) Each federal agency otherwise authorized by law to plan, design, construct, operate or maintain any project or facility in or for the basin shall continue to have, exercise and discharge such authority except as specifically provided by this section.

**11.2 State and Local Agencies and Projects.** For the purposes of avoiding conflicts of jurisdiction and of giving full effect to the commission as a regional agency of the signatory parties, the following rules shall govern projects of the signatory states, their political subdivisions and public corporations affecting water resources of the basin:

(a) The planning of all projects related to powers delegated to the commission by this compact shall be undertaken in consultation with the commission;

(b) No expenditure or commitment shall be made for or on account of the construction, acquisition or operation of any project or facility unless it shall have first been included by the commission in the comprehensive plan;

(c) Each state and local agency otherwise authorized by law to plan, design, construct, operate or maintain any project or facility in or for the basin shall continue to have, exercise and discharge such authority, except as specifically provided by this section.

**11.3 Reserved Taxing Powers of States.** Each of the signatory parties reserves the right to levy, assess and collect fees, charges and taxes on or measured by the withdrawal or diversion of waters of the basin for use within the jurisdictions of the respective signatory parties.

**11.4 Project Costs and Evaluation Standards.** The commission shall establish uniform standards and procedures for the evaluation, determination of benefits, and cost allocations of projects affecting the basin, and for the determination of project priorities, pursuant to the requirements of the comprehensive plan and its water resources program. The commission shall develop equitable cost sharing and reimbursement formulas for the signatory parties including:

(a) Uniform and consistent procedures for the allocation of project costs among purposes included in multiple-purpose programs;

(b) Contracts and arrangements for sharing financial responsibility among and with signatory parties, public bodies, groups and private enterprise, and for the supervision of their performance;

(c) Establishment and supervision of a system of accounts for reimbursable purposes and directing the payments and charges to be made from such accounts;

(d) Determining the basis and apportioning amounts (i) of reimbursable revenues to be paid signatory parties or their political subdivisions, and (ii) of payments in lieu of taxes to any of them.

**11.5 Cooperative Services.** The commission shall furnish technical services, advice and consultation to authorized agencies of the signatory parties with respect to the water resources of the basin, and each of the signatory parties pledges itself to provide technical and administrative services to the commission upon request, within the limits of available appropriations and to cooperate generally with the commission for the purposes of this compact, and the cost of such services may be reimbursable whenever the parties deem appropriate.



## ARTICLE 12

## CAPITAL FINANCING

**Section 12.1 Borrowing Power.** The commission may borrow money for any of the purposes of this compact, and may issue its negotiable bonds and other evidences of indebtedness in respect thereto.

All such bonds and evidences of indebtedness shall be payable solely out of the properties and revenues of the commission without recourse to taxation. The bonds and other obligations of the commission, except as may be otherwise provided in the indenture under which they were issued, shall be direct and general obligations of the commission and the full faith and credit of the commission are hereby pledged for the prompt payment of the debt service thereon and for the fulfillment of all other undertakings of the commission assumed by it to or for the benefit of the holders thereof.

**12.2 Funds and Expenses.** The purposes of this compact shall include without limitation thereto all costs of any project or facility or any part thereof, including interest during a period of construction and a reasonable time thereafter and any incidental expenses (legal, engineering, fiscal, financial consultant and other expenses) connected with issuing and disposing of the bonds; all amounts required for the creation of an operating fund, construction fund, reserve fund, sinking fund, or other special fund; all other expenses connected with the planning, design, acquisition, construction, completion, improvement or reconstruction of any facility or any part thereof; and reimbursement of advances by the commission or by others for such purposes and for working capital

**12.3 Credit Excluded; Officers, State and Municipal.** The commission shall have no power to pledge the credit of any signatory party, or of any county or municipality, or to impose any obligation for payment of the bonds upon any signatory party or any county or municipality. Neither the commissioners nor any person executing the bonds shall be liable personally on the bonds of the commission or be subject to any personal liability or accountability by reason of the issuance thereof.

**12.4 Funding and Refunding.** Whenever the commission deems it expedient, it may fund and refund its bonds and other obligations whether or not such bonds and obligations have

matured. It may provide for the issuance, sale or exchange of refunding bonds for the purpose of redeeming or retiring any bonds (including the payment of any premium, duplicate interest or cash adjustment required in connection therewith) issued by the commission or issued by any other issuing body, the proceeds of the sale of which have been applied to any facility acquired by the commission or which are payable out of the revenues of any facility acquired by the commission. Bonds may be issued partly to refund bonds and other obligations then outstanding, and partly for any other purpose of the commission. All provisions of this compact applicable to the issuance of bonds are applicable to refunding bonds and to the issuance, sale or exchange thereof.

**12.5 Bonds; Authorization Generally.** Bonds and other indebtedness of the commission shall be authorized by resolution of the commission. The validity of the authorization and issuance of any bonds by the commission shall not be dependent upon nor affected in any way by: (i) the disposition of bond proceeds by the commission or by contract, commitment or action taken with respect to such proceeds; or (ii) the failure to complete any part of the project for which bonds are authorized to be issued. The commission may issue bonds in one or more series and may provide for one or more consolidated bond issues, in such principal amounts and with such terms and provisions as the commission may deem necessary. The bonds may be secured by a pledge of all or any part of the property, revenues and franchises under its control. Bonds may be issued by the commission in such amount, with such maturities and in such denominations and form or forms, whether coupon or registered, as to both principal and interest, as may be determined by the commission. The commission may provide for redemption of bonds prior to maturity on such notice and at such time or times and with such redemption provisions, including premiums, as the commission may determine.

**12.6 Bonds; Resolutions and Indentures Generally.** The commission may determine and enter into indentures providing for the principal amount, date or dates, maturities, interest rate, denominations, form, registration, transfer, interchange and other provisions of the bonds and coupons and the terms and conditions upon which the same shall be executed, issued, secured, sold, paid, redeemed, funded and refunded. The resolution of the commission authorizing any bond or any indenture so authorized under which the bonds are issued may include all

such covenants and other provisions other than any restriction on the regulatory powers vested in the commission by this compact as the commission may deem necessary or desirable for the issue, payment, security, protection or marketing of the bonds, including without limitation covenants and other provisions as to the rates or amounts of fees, rents and other charges to be charged or made for use of the facilities; the use, pledge, custody, securing, application and disposition of such revenues, of the proceeds of the bonds, and of any other moneys of the commission; the operation, maintenance, repair and reconstruction of the facilities and the amounts which may be expended therefor; the sale, lease or other disposition of the facilities; the insuring of the facilities and of the revenues derived therefrom; the construction or other acquisition of other facilities; the issuance of additional bonds or other indebtedness; the rights of the bondholders and of any trustee for the bondholders upon default by the commission or otherwise; and the modification of the provisions of the indenture and of the bonds. Reference on the face of the bonds to such resolution or indenture by its date of adoption or the apparent date on the face thereof is sufficient to incorporate all of the provisions thereof and of this compact into the body of the bonds and their appurtenant coupons. Each taker and subsequent holder of the bonds or coupons, whether the coupons are attached to or detached from the bonds, has recourse to all of the provisions of the indenture and of this compact and is bound thereby.

**12.7 Maximum Maturity.** No bond or its terms shall mature in more than fifty years from its own date and in the event any authorized issue is divided into two or more series or divisions, the maximum maturity date herein authorized shall be calculated from the date on the face of each bond separately, irrespective of the fact that different dates may be prescribed for the bonds of each separate series or division of any authorized issue.

**12.8 Tax Exemption.** All bonds issued by the commission under the provisions of this compact and the interest thereof shall at all times be free and exempt from all taxation by or under authority of any of the signatory parties, except for transfer, inheritance and estate taxes.

**12.9 Interest.** Bonds shall bear interest at a rate of not to exceed six percent per annum, payable annually or semi-annually.

**12.10 Place of Payment.** The commission may provide for the payment of the principal and interest of bonds at any place or places within or without the signatory states, and in any specified lawful coin or currency of the United States of America.

**12.11 Execution.** The commission may provide for the execution and authentication of bonds by the manual, lithographed or printed facsimile signature of officers of the commission, and by additional authentication by a trustee or fiscal agent appointed by the commission. If any of the officers whose signatures or counter signatures appear upon the bonds or coupons cease to be officers before the delivery of the bonds or coupons, their signatures or counter signatures are nevertheless valid and of the same force and effect as if the officers had remained in office until the delivery of the bonds and coupons.

**12.12 Holding Own Bonds.** The commission shall have power out of any funds available therefor to purchase its bonds and may hold, cancel or resell such bonds.

**12.13 Sale.** The commission may fix terms and conditions for the sale or other disposition of any authorized issue of bonds. The commission may sell bonds at less than their par or face value but no issue of bonds may be sold at an aggregate price below the par or face value thereof if such sale would result in a net interest cost to the commission calculated upon the entire issue so sold of more than six percent per annum payable semi-annually, according to standard tables of bond values. All bonds issued and sold for cash pursuant to this act shall be sold on sealed proposals to the highest bidder. Prior to such sale, the commission shall advertise for bids by publication of a notice of sale not less than ten days prior to the date of sale, at least once in a newspaper of general circulation printed and published in New York City carrying municipal bond notices and devoted primarily to financial news. The commission may reject any and all bids submitted and may thereafter sell the bonds so advertised for sale at private sale to any financially responsible bidder under such terms and conditions as it deems most advantageous to the public interest, but the bonds shall not be sold at a net interest cost calculated upon the entire issue so advertised, greater than the lowest bid which was rejected. In the event the commission desires to issue its bonds in exchange for an existing facility or portion thereof, or in exchange for bonds secured by the revenues of an existing

facility, it may exchange such bonds for the existing facility or portion thereof or for the bonds so secured, plus an additional amount of cash, without advertising such bonds for sale.

**12.14 Negotiability.** All bonds issued under the provisions of this compact are negotiable instruments, except when registered in the name of a registered owner.

**12.15 Legal Investments.** Bonds of the commission shall be legal investments for savings banks, fiduciaries and public funds in each of the signatory states.

**12.16 Validation Proceedings.** Prior to the issuance of any bonds, the commission may institute a special proceeding to determine the legality of proceedings to issue the bonds and their validity under the laws of any of the signatory parties. Such proceeding shall be instituted and prosecuted in rem and the judgment rendered therein shall be conclusive against all persons whomsoever and against each of the signatory parties.

**12.17 Recording.** No indenture need be recorded or filed in any public office, other than the office of the commission. The pledge of revenues provided in any indenture shall take effect forthwith as provided therein and irrespective of the date of receipts of such revenues by the commission or the indenture trustee. Such pledge shall be effective as provided in the indenture without physical delivery of the revenues to the commission or to the indenture trustee.

**12.18 Pledged Revenues.** Bond redemption and interest payments shall, to the extent provided in the resolution or indenture, constitute a first, direct and exclusive charge and lien on all such rates, rents, tolls, fees and charges and other revenues and interest thereon received from the use and operation of the facility, and on any sinking or other funds created therefrom. All such rates, rents, tolls, fees, charges and other revenues, together with interest thereon, shall constitute a trust fund for the security and payment of such bonds and except as and to the extent provided in the indenture with respect to the payment therefrom of expenses for other purposes including administration, operation, maintenance, improvements or extensions of the facilities or other purposes shall not be used or pledged for any other purpose so long as such bonds, or any of them, are outstanding and unpaid.

**12.19 Remedies.** The holder of any bond may for the equal benefit and protection of all holders of bonds similarly situated:

(a) by mandamus or other appropriate proceedings require and compel the performance of any of the duties imposed upon the commission or assumed by it, its officers, agents or employees under the provisions of any indenture, in connection with the acquisition, construction, operation, maintenance, repair, reconstruction or insurance of the facilities, or in connection with the collection, deposit, investment, application and disbursement of the rates, rents, tolls, fees, charges and other revenues derived from the operation and use of the facilities, or in connection with the deposit, investment and disbursement of the proceeds received from the sale of bonds; or (b) by action or suit in a court of competent jurisdiction of any signatory party require the commission to account as if it were the trustee of an express trust, or enjoin any acts or things which may be unlawful or in violation of the rights of the holders of the bonds. The enumeration of such rights and remedies does not, however, exclude the exercise or prosecution of any other rights or remedies available to the holders of bonds.

#### **12.20 Capital Financing by Signatory Parties; Guarantees.**

(a) The signatory parties will provide such capital funds required for projects of the commission as may be authorized by their respective statutes in accordance with a cost sharing plan prepared pursuant to Article 11 of this compact; but nothing in this section shall be deemed to impose any mandatory obligation on any of the signatory parties other than such obligations as may be assumed by a signatory party in connection with a specific project or facility.

(b) Bonds of the commission, notwithstanding any other provision of this compact, may be executed and delivered to any duly authorized agency of any of the signatory parties without public offering and may be sold and resold with or without the guaranty of such signatory party, subject to and in accordance with the constitutions of the respective signatory parties.

(c) The commission may receive and accept, and the signatory parties may make, loans, grants, appropriations, advances and payments of reimbursable or non-reimbursable funds or property in any form for the capital or operating purposes of the commission.



## ARTICLE 13

## PLAN, PROGRAM AND BUDGETS

**Section 13.1 Comprehensive Plan.** The commission shall develop and adopt, and may from time to time review and revise, a comprehensive plan for the immediate and long range development and use of the water resources of the basin. The plan shall include all public and private projects and facilities which are required, in the judgment of the commission, for the optimum planning, development, conservation, utilization, management and control of the water resources of the basin to meet present and future needs; provided that the plan shall include any projects required to conform with any present or future decree or judgment of any court of competent jurisdiction. The commission may adopt a comprehensive plan or any revision thereof in such part or parts as it may deem appropriate, provided that before the adoption of the plan or any part or revision thereof the commission shall consult with water users and interested public bodies and public utilities and shall consider and give due regard to the findings and recommendations of the various agencies of the signatory parties and their political subdivisions. The commission shall conduct public hearings with respect to the comprehensive plan prior to the adoption of the plan or any part of the revision thereof.

**13.2 Water Resources Program.** The commission shall annually adopt a water resources program, based upon the comprehensive plan, consisting of the projects and facilities which the commission proposes to be undertaken by the commission and by other authorized governmental and private agencies, organizations and persons during the ensuing six years or such other reasonably foreseeable period as the commission may determine. The water resources program shall include a systematic presentation of:

- 1) the quantity and quality of water resources needs for such period;
- 2) the existing and proposed projects and facilities required to satisfy such needs, including all public and private projects to be anticipated;
- 3) a separate statement of the projects proposed to be undertaken by the commission during such period.

**13.3 Annual Current Expense and Capital Budgets.**

(a) The commission shall annually adopt a capital budget including all capital projects it proposes to undertake or continue during the budget period containing a statement of the estimated cost of each project and the method of financing thereof.

(b) The commission shall annually adopt a current expense budget for each fiscal year. Such budget shall include the commission's estimated expenses for administration, operation, maintenance and repairs, including a separate statement thereof for each project, together with its cost allocation. The total of such expenses shall be balanced by the commission's estimated revenues from all sources, including the cost allocations undertaken by any of the signatory parties in connection with any project. Following the adoption of the annual current expense budget by the commission, the executive director of the commission shall:

- 1) certify to the respective signatory parties the amounts due in accordance with existing cost sharing established for each project; and

- 2) transmit certified copies of such budget to the principal budget officer of the respective signatory parties at such time and in such manner as may be required under their respective budgetary procedures. The amount required to balance the current expense budget in addition to the aggregate amount of item (1) above and all other revenues available to the commission shall be apportioned equitably among the signatory parties by unanimous vote of the commission, and the amount of such apportionment to each signatory party shall be certified together with the budget.

(c) The respective signatory parties covenant and agree to include the amounts so apportioned for the support of the current expense budget in their respective budgets next to be adopted, subject to such review and approval as may be required by their respective budgetary processes. Such amounts shall be due and payable to the commission in quarterly installments during its fiscal year, provided that the commission may draw upon its working capital to finance its current expense budget pending remittances by the signatory parties.



ARTICLE 14

GENERAL PROVISIONS

**Section 14.1 Auxiliary Powers of Commission; Functions of Commissioners.**

(a) The commission, for the purposes of this compact, may:

1) Adopt and use a corporate seal, enter into contracts, sue and be sued in all courts of competent jurisdiction;

2) Receive and accept such payments, appropriations, grants, gifts, loans, advances and other funds, properties and services as may be transferred or made available to it by any signatory party or by any other public or private corporation or individual, and enter into agreements to make reimbursement for all or part thereof;

3) Provide for, acquire and adopt detailed engineering, administrative, financial and operating plans and specifications to effectuate, maintain or develop any facility or project;

4) Control and regulate the use of facilities owned or operated by the commission;

5) Acquire, own, operate, maintain, control, sell and convey real and personal property and any interest therein by contract, purchase, lease, license, mortgage or otherwise as it may deem necessary for any project or facility, including any and all appurtenances thereto necessary, useful or convenient for such ownership, operation, control, maintenance or conveyance;

6) Have and exercise all corporate powers essential to the declared objects and purposes of the commission.

(b) The commissioners, subject to the provisions of this compact, shall:

1) Serve as the governing body of the commission, and exercise and discharge its powers and duties except as otherwise provided by or pursuant to this compact;

2) Determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid subject to any pro-

visions of law specifically applicable to agencies or instrumentalities created by compact;

3) Provide for the internal organization and administration of the commission;

4) Appoint the principal officers of the commission and delegate to and allocate among them administrative functions, powers and duties;

5) Create and abolish offices, employments and position as it deems necessary for the purposes of the commission, and subject to the provisions of this article, fix and provide for the qualification, appointment, removal, term, tenure, compensation, pension and retirement rights of its officers and employees;

6) Let and execute contracts to carry out the powers of the commission.

**14.2 Regulations; Enforcement.** The commission may:

(a) Make and enforce reasonable rules and regulations for the effectuation, application and enforcement of this compact; and it may adopt and enforce practices and schedules for or in connection with the use, maintenance and administration of projects and facilities it may own or operate and any product or service rendered thereby; provided that any rule or regulation, other than one which deals solely with the internal management of the commission, shall be adopted only after public hearing and shall not be effective unless and until filed in accordance with the law of the respective signatory parties applicable to administrative rules and regulations generally; and

(b) Designate any officer, agent or employee of the commission to be an investigator or watchman and such person shall be vested with the powers of a peace officer of the state in which he is duly assigned to perform his duties.

**14.3 Tax Exemption.** The commission, its property, functions, and activities shall be exempt from taxation by or under the authority of any of the signatory parties or any political subdivision thereof; provided that in lieu of property taxes the commission shall, as to specific projects, make payments to local taxing districts in annual amounts which shall equal the taxes lawfully assessed upon property for the tax year next prior to its acquisition by the commission for a period of ten years. The nature and amount of such payments shall be re-

viewed by the commission at the end of ten years, and from time to time thereafter, upon reasonable notice and opportunity to be heard to the affected taxing district, and the payments may be thereupon terminated or continued in such reasonable amount as may be necessary or desirable to take into account hardships incurred and benefits received by the taxing jurisdiction which are attributable to the project.

#### **14.4 Meetings; Public Hearing; Records, Minutes.**

(a) All meetings of the commission shall be open to the public.

(b) The commission shall conduct at least one public hearing prior to the adoption of the comprehensive plan, water resources program, annual capital and current expense budgets, the letting of any contract for the sale or other disposition by the commission of hydroelectric energy or water resources to any person, corporation or entity, and in all other cases wherein this compact requires a public hearing. Such hearing shall be held upon at least ten days public notice given by posting at the offices of the commission. The commission shall also provide forthwith for distribution of such notice to the press and by the mailing of a copy thereof to any person who shall request such notices.

(c) The minutes of the commission shall be a public record open to inspection at its offices during regular business hours.

#### **14.5 Officers Generally.**

(a) The officers of the commission shall consist of an executive director and such additional officers, deputies and assistants as the commission may determine. The executive director shall be appointed and may be removed by the affirmative vote of a majority of the full membership of the commission. All other officers and employees shall be appointed by the executive director under such rules of procedure as the commission may determine.

(b) In the appointment and promotion of officers and employees for the commission, no political, racial, religious or residence test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be solely on the basis of merit and fitness. Any officer or employee of the commission who is found by the commission to be guilty of a violation of this section shall be removed from office by the commission.

**14.6 Oath of Office.** An oath of office in such form as the commission shall prescribe shall be taken, subscribed and filed with the commission by the executive director and by each officer appointed by him not later than fifteen days after the appointment.

**14.7 Bond.** Each officer shall give such bond and in such form and amount as the commission may require for which the commission may pay the premium.

**14.8 Prohibited Activities.**

(a) No commissioner, officer or employee shall:

1) be financially interested, either directly or indirectly, in any contract, sale, purchase, lease or transfer of real or personal property to which the commission is a party;

2) solicit or accept money or any other thing of value in addition to the compensation or expenses paid him by the commission for services performed within the scope of his official duties;

3) offer money or any thing of value for or in consideration of obtaining an appointment, promotion or privilege in his employment with the commission.

(b) Any officer or employee who shall willfully violate any of the provisions of this section shall forfeit his office or employment.

(c) Any contract or agreement knowingly made in contravention of this section is void.

(d) Officers and employees of the commission shall be subject in addition to the provisions of this section to such criminal and civil sanctions for misconduct in office as may be imposed by federal law and the law of the signatory state in which such misconduct occurs.

**14.9 Purchasing.** Contract for the construction, reconstruction or improvement of any facility when the expenditure required exceeds ten thousand dollars and contracts for the purchase of services, supplies, equipment and materials when the expenditure required exceeds two thousand five hundred dollars shall be advertised and let upon sealed bids to the lowest responsible bidder. Notice requesting such bids shall be published in a manner reasonably likely to attract prospective bidders, which publication shall be made at least ten days before

bids are received and in at least two newspapers of general circulation in the basin. The commission may reject any and all bids and readvertise in its discretion. If after rejecting bids the commission determines and resolves that in its opinion the supplies, equipment and materials may be purchased at a lower price in the open market, the commission may give each responsible bidder an opportunity to negotiate a price and may proceed to purchase the supplies, equipment and materials in the open market at a negotiated price which is lower than the lowest rejected bid of a responsible bidder, without further observance of the provisions requiring bids or notice. The commission shall adopt rules and regulations to provide for purchasing from the lowest responsible bidder when sealed bids, notice and publication are not required by this section. The commission may suspend and waive the provisions of this section requiring competitive bids whenever:

1) the purchase is to be made from or the contract to be made with the federal or any state government or any agency or political subdivision thereof or pursuant to any open end bulk purchase contract of any of them;

2) the public exigency requires the immediate delivery of the articles or performance of the service;

3) only one source of supply is available;

4) the equipment to be purchased is of a technical nature and the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts in the public interest; or

5) services are to be provided of a specialized or professional nature.

**14.10 Insurance.** The commission may self-insure or purchase insurance and pay the premiums therefor against loss or damage to any of its properties; against liability for injury to persons or property; and against loss of revenue from any cause whatsoever. Such insurance coverage shall be in such form and amount as the commission may determine, subject to the requirements of any agreement arising out of the issuance of bonds by the commission.

#### **14.11 Annual Independent Audit.**

(a) As soon as practical after the closing of the fiscal year, an audit shall be made of the financial accounts of the com-

mission. The audit shall be made by qualified certified public accountants selected by the commission, who have no personal interest direct or indirect in the financial affairs of the commission or any of its officers or employees. The report of audit shall be prepared in accordance with accepted accounting practices and shall be filed with the chairman and such other officers as the commission shall direct. Copies of the report shall be distributed to each commissioner and shall be made available for public distribution.

(b) Each signatory party by its duly authorized officers shall be entitled to examine and audit at any time all of the books, documents, records, files and accounts and all other papers, things or property of the commission. The representatives of the signatory parties shall have access to all books, documents, records, accounts, reports, files and all other papers, things or property belonging to or in use by the commission and necessary to facilitate the audit and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents and custodians.

(c) The financial transactions of the commission shall be subject to audit by the general accounting office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the comptroller general of the United States. The audit shall be conducted at the place or places where the accounts of the commission are kept.

(d) Any officer or employee who shall refuse to give all required assistance and information to the accountants selected by the commission or to the authorized officers of any signatory party or who shall refuse to submit to them for examination such books, documents, records, files, accounts, papers, things or property as may be requested shall forfeit his office.

**14.12 Reports.** The commission shall make and publish an annual report to the legislative bodies of the signatory parties and to the public reporting on its programs, operations and finances. It may also prepare, publish and distribute such other public reports and informational materials as it may deem necessary or desirable.

**14.13 Grants, Loans or Payments by States or Political Subdivisions.**

(a) Any or all of the signatory parties or any political subdivision thereof may:



1) Appropriate to the commission such funds as may be necessary to pay preliminary expenses such as the expenses incurred in the making of borings, and other studies of sub-surface conditions, in the preparation of contracts for the sale of water and in the preparation of detailed plans and estimates required for the financing of a project;

2) Advance to the commission, either as grants or loans, such funds as may be necessary or convenient to finance the operation and management of or construction by the commission of any facility or project;

3) Make payments to the commission for benefits received or to be received from the operation of any of the projects or facilities of the commission.

(b) Any funds which may be loaned to the commission either by a signatory party or a political subdivision thereof shall be repaid by the commission through the issuance of bonds or out of other income of the commission, such repayment to be made within such period and upon such terms as may be agreed upon between the commission and the signatory party or political subdivision making the loan.

#### **14.14 Condemnation Proceedings.**

(a) The commission shall have the power to acquire by condemnation the fee or any lesser interest in lands, lands lying under water, development rights in land, riparian rights, water rights, waters and other real or personal property within the basin for any project or facility authorized pursuant to this compact. This grant of power of eminent domain includes but is not limited to the power to condemn for the purposes of this compact any property already devoted to a public use, by whomsoever owned or held, other than property of a signatory party and any property held, constructed, operated or maintained in connection with a diversion authorized by a United States Supreme Court decree. Any condemnation of any property or franchises owned or used by a municipal or privately owned public utility, unless the affected public utility facility is to be relocated or replaced, shall be subject to the authority of such state board, commission or other body as may have regulatory jurisdiction over such public utility.

(b) Such power of condemnation shall be exercised in accordance with the provisions of any federal law applicable to the commission; provided that if there is no such applicable federal law, condemnation proceedings shall be in accordance with the



provisions of such general state condemnation law as may be in force in the signatory state in which the property is located.

(c) Any award or compensation for the taking of property pursuant to this article shall be paid by the commission, and none of the signatory parties nor any other agency, instrumentality or political subdivision thereof shall be liable for such award or compensation.

#### **14.15 Conveyance of Lands and Relocation of Public Facilities.**

(a) The respective officers, agencies, departments, commissions or bodies having jurisdiction and control over real and personal property owned by the signatory parties are authorized and empowered to transfer and convey in accordance with the laws of the respective parties to the commission any such property as may be necessary or convenient to the effectuation of the authorized purposes of the commission.

(b) Each political subdivision of each of the signatory parties is authorized and empowered, notwithstanding any contrary provision of law, to grant and convey to the commission, upon the commission's request, any real property or any interest therein owned by such political subdivisions including lands lying under water and lands already devoted to public use which may be necessary or convenient to the effectuation of the authorized purposes of the commission.

(c) Any highway, public utility or other public facility which will be dislocated by reason of a project deemed necessary by the commission to effectuate the authorized purposes of this compact shall be relocated and the cost thereof shall be paid in accordance with the law of the state in which the facility is located; provided that the cost of such relocation payable by the commission shall not in any event exceed the expenditure required to serve the public convenience and necessity.

**14.16 Rights of Way.** Permission is hereby granted to the commission to locate, construct and maintain any aqueducts, lines, pipes, conduits and auxiliary facilities authorized to be acquired, constructed, owned, operated or maintained by the commission in, over, under or across any streets and highways now or hereafter owned, opened or dedicated to or for public use, subject to such reasonable conditions as the highway department of the signatory party may require.

**14.17 Penal Sanction.** Any person, association or corporation who violates or attempts or conspires to violate any provision of this compact or any rule, regulation or order of the commission duly made, promulgated or issued pursuant to the compact in addition to any other remedy, penalty or consequence provided by law shall be punishable as may be provided by statute of any of the signatory parties within which the offense is committed; provided that in the absence of such provision any such person, association or corporation shall be liable to a penalty of not less than \$50 nor more than \$1,000 for each such offense to be fixed by the court which the commission may recover in its own name in any court of competent jurisdiction, and in a summary proceeding where available under the practice and procedure of such court. For the purposes of this section in the event of a continuing offense each day of such violation, attempt or conspiracy shall constitute a separate offense.

**14.18 Tort Liability.** The commission shall be responsible for claims arising out of the negligent acts or omissions of its officers, agents and employees only to the extent and subject to the procedures prescribed by law generally with respect to officers, agents and employees of the government of the United States.

**14.19 Effect on Riparian Rights.** Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights.

**14.20 Amendments and Supplements.** Amendments and supplements to this compact to implement the purposes thereof may be adopted by legislative action of any of the signatory parties concurred in by all of the others.

**14.21 Construction and Severability.** The provisions of this Act and of agreements thereunder shall be severable and if any phrase, clause, sentence or provision of the Delaware River Basin Compact or such agreement is declared to be unconstitutional or the applicability thereof to any signatory party, agency or person is held invalid, the constitutionality of the remainder of such compact or such agreement and the applicability thereof to any other signatory party, agency, person or circumstance shall not be affected thereby. It is the legislative intent that the provisions of such compact be reasonably and liberally construed.

**14.23 Effective Date; Execution.** This compact shall become binding and effective thirty days after the enactment of concurring legislation by the federal government, the states of Delaware, New Jersey and New York, and the Commonwealth of Pennsylvania. The compact shall be signed and sealed in six duplicate original copies by the respective chief executives of the signatory parties. One such copy shall be filed with the Secretary of State of each of the signatory parties or in accordance with the laws of the state in which the filing is made, and one copy shall be filed and retained in the archives of the commission upon its organization.

IN WITNESS WHEREOF, and in evidence of the adoption and enactment into law of this compact by the Congress and legislatures, respectively, of the signatory parties, the President of the United States and the respective Governors do hereby, in accordance with authority conferred by law, sign this compact in six duplicate original copies, as attested by the respective secretaries of state, and have caused the seals of the United States and of the respective states to be hereunto affixed this 2nd day of November, 1961.

s/ JOHN F. KENNEDY  
PRESIDENT OF THE UNITED STATES

*Attest*  
s/ DEAN RUSK  
SECRETARY OF STATE

s/ ELBERT N. CARVEL  
GOVERNOR OF  
THE STATE OF DELAWARE

*Attest*  
s/ ELISHA C. DUKES  
SECRETARY OF STATE

s/ ROBERT B. MEYNER  
GOVERNOR OF  
THE STATE OF NEW JERSEY

*Attest*  
s/ EDWARD J. PATTEN  
SECRETARY OF STATE

s/ NELSON A. ROCKEFELLER  
GOVERNOR OF  
THE STATE OF NEW YORK

*Attest*  
s/ CAROLINE K. SIMON  
SECRETARY OF STATE

s/ DAVID L. LAWRENCE  
GOVERNOR OF  
THE COMMONWEALTH OF PENNSYLVANIA

*Attest*  
s/ E. JAMES TRIMARCHI, Jr.  
SECRETARY OF THE COMMONWEALTH

## PART II

### EFFECTUATION

UNITED STATES: (*from Public Law 87-328, 75 Stat. 688*)

**15.1 Reservations.** In the exercise of the powers reserved to the Congress, pursuant to Section 1.4 of the Compact, the consent to and participation in the Compact by the United States is subject to the following conditions and reservations:

(a) Notwithstanding any provision of the Delaware River Basin Compact the Delaware River Basin Commission shall not undertake any project (as defined in such compact), other than a project for which State supplied funds only will be used, beyond the planning stage until—

(1) such commission has submitted to the Congress such complete plans and estimates for such project as may be necessary to make an engineering evaluation of such project, including—

(A) where the project will serve more than one purpose, an allocation of costs among the purposes served and an estimate of the ratio of benefits to costs for each such purpose.

(B) an apportionment of costs among the beneficiaries of the project, including the portion of the costs to be borne by the Federal Government and by State and local governments, and

(C) a proposal for financing the project, including the terms of any proposed bonds or other evidences of indebtedness to be used for such purpose; and

(2) such project has been authorized by Act of Congress.

(b) No provision of Section 3.7 of the Compact shall be deemed to authorize the commission to impose any charge for water withdrawals or diversions from the Basin if such withdrawals or diversions could lawfully have been made without charge on the effective date of the Compact; or to impose any charges with respect to commercial navigation within the Basin, jurisdiction over which is reserved to the Federal Government:

*Provided*, That this paragraph shall be applicable to the extent not inconsistent with Section 1.4 of this Compact.

(c) Nothing contained in the Compact shall be deemed to restrict the executive powers of the President in the event of a national emergency.

(d) Notwithstanding the provisions of Article 2, Section 2.2 of the Compact, the member of the commission appointed by the President of the United States and his alternate shall serve at the pleasure of the President.

(e) Nothing contained in the Compact shall be construed as impairing or in any manner affecting the applicability to all Federal funds budgeted and appropriated for use by the commission, or such authority over budgetary and appropriation matters as the President and Congress may have with respect to agencies in the Executive Branch of the Federal Government.

(f) Except to the same extent that state bonds are or may continue to be free or exempt from Federal taxation under the internal revenue laws of the United States, nothing contained in the Compact shall be construed as freeing or exempting from internal revenue taxation in any manner whatsoever any bonds issued by the commission, their transfer, or the income therefrom (including any profits made on the sale thereon).

(g) Nothing contained in the Compact shall be construed to obligate the United States legally or morally to pay the principal or interest on any bonds issued by the Delaware River Basin Commission.

(h) Notwithstanding the provisions of Section 11.5 or any other provision of the Compact, the furnishing of technical services to the commission by agencies of the Executive Branch of the Government of the United States is pledged only to the extent that the respective agencies shall from time to time agree thereto or to the extent that the President may from time to time direct such agencies to perform such services for the commission. Nothing in the Compact shall be deemed to require the United States to furnish administrative services or facilities for carrying out functions of the commission except to the extent that the President may direct.

(i) All laborers and mechanics employed by contractors or subcontractors in the construction, alteration or repair, including

painting and decorating, of projects, buildings and works which are undertaken by the commission or are financially assisted by it, shall be paid wages at rates not less than those prevailing on similar construction in the locality so determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5), and every such employee shall receive compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in any workweek in excess of eight hours in any workday or forty hours in any workweek, as the case may be. A provision stating the minimum wages thus determined and the requirement that overtime be paid as above provided shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project. The Secretary of Labor shall have, with respect to the administration and enforcement of labor standards specified in this provision, the supervisory, investigatory and other authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176, 64 Stat. 1267, 5 U.S.C. 133z-15, and Section 2 of the Act of June 13, 1934, as amended (48 Stat. 948, as amended; 40 U.S.C. 276(c)).

(j) Contracts for the manufacture or furnishing of materials, supplies, articles and equipment with the commission which are in excess of \$10,000 shall be subject to the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35 et seq.).

(k) Notwithstanding any other provision of this Act, nothing contained in this Act or in the Compact shall be construed as superseding or limiting the functions, under any other law, of the Secretary of Health, Education, and Welfare or of any other officer or agency of the United States, relating to water pollution: *Provided*, That the exercise of such functions shall not limit the authority of the commission to control, prevent, or abate water pollution.

(l) The provisions of Section 8.4 of Article 8 of the Compact shall not be construed to apply to facilities operated pursuant to any other Federal law.

(m) For purposes of the Act of June 25, 1948, 62 Stat. 982, as amended (Title 28, U.S. Code, chapter 171, and Sections 1346(b) and 240(b)) and the Act of March 3, 1887, 24 Stat. 505, as amended (Title 28, U.S. Code, Section 1402, 1491, 1496, 1501, 1503, 2071, 2072, 2411, 2412, 2501), and the Act of June 11, 1946, 60 Stat. 237, as amended (Title 5, U.S. Code, Sections 1001 and



1011, Title 50 App. U.S. Code, Section 1900), the commission shall not be considered a Federal agency.

(n) The officers and employees of the commission (other than the United States member, alternate United States member, and advisors, and personnel employed by the United States member under direct Federal appropriation) shall not be deemed to be, for any purpose, officers or employees of the United States or to become entitled at any time by reason of employment by the commission to any compensation or benefit payable or made available by the United States solely and directly to its officers or employees.

(o) Neither the Compact nor this Act shall be deemed to enlarge the authority of any Federal agency other than the commission to participate in or to provide funds for projects or activities in the Delaware River Basin.

(p) The United States district courts shall have original jurisdiction of all cases or controversies arising under the Compact, and this Act and any case or controversy so arising initiated in a State Court shall be removable to the appropriate United States district court in the manner provided by § 1446, Title 28 U.S.C. Nothing contained in the Compact or elsewhere in this Act shall be construed as a waiver by the United States of its immunity from suit.

(q) The right to alter, amend, or repeal this Act is hereby expressly reserved. The right is hereby reserved to the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by the Delaware River Basin Compact Commission as is deemed appropriate by the Congress or any such committee.

(r) The provisions of Sections 2.4 and 2.6 of Article 2 of the Compact notwithstanding, the member and alternate member appointed by the President and advisor there referred to may be paid compensation by the United States, such compensation to be fixed by the President at the rates which he shall deem to prevail in respect to comparable officers in the executive branch.

(s) 1. Nothing contained in this Act or in the Compact shall impair or affect the constitutional authority of the United States or any of its powers, rights, functions, or jurisdiction under other existing or future legislation in and over the area or waters which are the subject of the Compact including projects of the commission: *Provided*, That whenever a comprehensive plan,

or any part or revision thereof, has been adopted with the concurrence of the member appointed by the President, the exercise of any powers conferred by law on any officer, agency or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan and the provisions of Section 3.8 and Article 11 of the Compact shall be applicable to the extent necessary to avoid such substantial conflict: *Provided further*, That whenever the President shall find and determine that the national interest so requires, he may suspend, modify or delete any provision of the comprehensive plan to the extent that it affects the exercise of any powers, rights, functions, or jurisdiction conferred by law on any officer, agency or instrumentality of the United States other than the commission. Such action shall be taken by executive order in which such finding and determination shall be set forth.

2. For the purposes of paragraph 1 hereof, concurrence by the member appointed by the President shall be presumed unless within 60 days after notice to him of adoption of the comprehensive plan, or any part or revision thereof, he shall file with the commission notice of his nonconcurrence. Each concurrence of the member appointed by the President in the adoption of the comprehensive plan or any part or revision thereof may be withdrawn by notice filed with the commission at any time between the first and sixtieth day of the sixth year after the initial adoption of the comprehensive plan and of every sixth year thereafter.

(t) In the event that any phrase, clause, sentence or provision of Section 1.4 of Article 1 of the Compact, is declared to be unconstitutional under the constitution of any of the signatory parties, or the applicability thereof to any signatory party, agency or person is held invalid by a court of last resort of competent jurisdiction, the United States shall cease to be a party to the Compact, except to the extent that the President deems remaining a party necessary and proper to protect the national interest, and shall cease to be bound by the terms thereof.

(u) All Acts or parts of Acts inconsistent with the provisions of this Act are hereby amended for the purpose of this Act to the extent necessary to carry out the provisions of this Act: *Provided, however*, That no act of the commission shall have the effect of repealing, modifying or amending any Federal law.

**15.2 Effectuation.** (a) The President is authorized to take such action as may be necessary and proper, in his discretion, to effectuate the Compact and the initial organization and operation of the Commission thereunder.

(b) Executive departments and other agencies of the executive branch of the Federal Government shall cooperate with and furnish appropriate assistance to the United States member. Such assistance shall include the furnishing of services and facilities and may include the detailing of personnel to the United States member. Appropriations are hereby authorized as necessary for the carrying out of the functions of the United States member, including appropriations for the employment of personnel by the United States member.

**15.3 Effective Date.** This Act shall take effect immediately.

**DELAWARE:** (*from 53 Delaware Laws, Chapter 71*)

**§ 1011. Repealer.** All acts and parts of acts inconsistent with any provision of this act are to the extent of such inconsistency hereby repealed.

**§ 1012. Effectuation by Chief Executive.** The chief executive is authorized to take such action as may be necessary and proper, in his discretion, to effectuate the compact and the initial organization and operation of the commission thereunder.

**§ 1013. Effective Date.** This act shall take effect immediately.

**NEW JERSEY:** (*from New Jersey Laws of 1961, Chapter 13*)

**15.1 Repealer.** All acts and parts of acts inconsistent with any provision of this act are to the extent of such inconsistency hereby repealed.

**15.2 Effectuation by Chief Executive.** The chief executive is authorized to take such action as may be necessary and proper, in his discretion, to effectuate the compact and the initial organization and operation of the commission thereunder.

**15.3 Effective Date.** This act shall take effect immediately.

**\*NEW YORK:** (*from New York Laws of 1961, Chapter 148*); with Sections of the Conservation Law as renumbered by Laws of 1962, Chapter 73.

**§ 631. Commissioner and Alternate.** 1. As provided in the second subdivision of section two of article two of the compact, the governor shall be this state's member on the commission

\*The Sections have been renumbered by Laws of 1962, Chapter 73 and now constitute Sections 602-612 of the Conservation Law.

established thereby. The governor shall appoint a member of the water resources commission as his alternate pursuant to the third subdivision of said section two of article two of the compact. In the absence of the governor and such member of the water resources commission, the powers, duties and functions of this state's member of the Delaware river basin commission shall be performed by the alternate of said department head on the water resources commission.

2. Any person serving on the Delaware river basin commission pursuant to this section shall be reimbursed for all necessary expenses incurred as an incident of such service, and such reimbursement shall be from the funds of said person's department or office.

**§ 632. Advisors.** 1. The member of the Delaware river basin commission from this state shall have an advisor as contemplated by subdivision six of section two of article two of the compact. Such advisor shall be the mayor of the city of New York or his designee, but no designee of the mayor shall be recognized as an advisor or accorded any privileges as such unless the mayor shall have notified the commission member from this state and the Delaware river basin commission in writing of the selection of such designee and of his identity.

2. The members of the water resources commission and the state commissioner of commerce shall constitute an advisory committee with whom the member of the Delaware river basin commission from this state shall consult with respect to the conduct of New York participation in the compact. Such member of the commission also shall consult from time to time with other officers of the state government or any subdivision thereof, as may be appropriate.

**§ 633. Consent to Alteration of Diversions.** 1. Consent of this state to the impairment, diminution or other adverse effect on diversions, compensating releases, rights, conditions, obligations, and provisions for the administration thereof as contemplated by subdivision three of section three of article three of the compact shall not be given, except with the prior approval of the water resources commission.

2. Except with respect to diversions governed by subdivision one of this section and the provision of the compact referred to therein, the provisions of section four hundred fifty-two of the

conservation law shall not apply to any diversion or furnishing of water authorized by or made pursuant to the compact.

**§ 634. Jurisdiction of Courts.** Except as otherwise specifically provided herein, the phrase "court of competent jurisdiction" as used in the compact shall, with reference to this state, mean the supreme court, and said court is hereby given all necessary and appropriate jurisdiction to hear and determine any action or proceeding brought before it pursuant to appropriate provisions of the compact. As used in subdivision six of section ten of article ten of the compact, the phrase "court of competent jurisdiction" shall mean a court in which an appropriate proceeding under article seventy-eight of the civil practice act may be brought. As used in item one of paragraph (a) of subdivision one of section fourteen of article fourteen of the compact, the phrase "court of competent jurisdiction" shall mean any court of this state in which an action or proceeding of the class brought by the Delaware river basin commission may be heard and determined.

**§ 635. Prior to Project Approval.** No project requiring a license, permit or other approval by any agency or officer of this state, or any subdivision thereof, shall be given any such license, permit, or approval, if such project requires approval of the Delaware river basin commission pursuant to the compact and such has not been given.

**§ 636. Agreements with Municipalities.** Any city, county, town or village within the "basin", as that term is defined in the compact, shall have power to make agreements to provide technical and financial aid as contemplated by paragraph (b) of subdivision two of section six of article six of the compact. Nothing herein contained shall be construed to relieve any such city, county, town or village from compliance with any general or special laws relating to the receipt of grants or other assistance from other governmental units and contracts in connection therewith.

**§ 637. Delegations of Power.** No agency or officer of this state or any subdivision thereof shall accept or exercise any delegation of power pursuant to subdivision one of section ten of article ten of the compact unless, in the absence of the compact, it would have the constitutional or statutory power to exercise such power on its own account.

**§ 638. Cooperative Services.** Departments, agencies and officers shall provide technical and administrative services to the Delaware river basin commission upon request, within the limits of available appropriations and shall cooperate generally with said commission for the purposes of the compact.

**§ 639. Budget.** The Delaware river basin commission shall submit annually to the director of the budget, in accordance with the rules and practice of the state, for study and consideration by such director, an estimate of moneys required to administer, manage and support the commission during the ensuing fiscal year. Such estimate shall include any request for appropriation of funds by New York and shall be accompanied by a tabulation of similar requests which the commission expects to make to each other member state and the formula or factors upon which such respective requests are based. The provisions of subdivision three of section thirteen of article thirteen of the compact shall apply to the budgetary and other fiscal matters related to the participation of this state in the compact.

**§ 640. Audit.** Pursuant to paragraph (b) of subdivision eleven of section fourteen of article fourteen of the compact, the state comptroller is hereby authorized and empowered from time to time to examine the accounts and books of the commission, including its receipts, disbursements and such other items referring to its financial standing as such comptroller may deem proper and to report the results of such examination to the governor.

**§ 641. Inconsistent Laws.** No provision of the conservation law or of any other law, which is inconsistent with the provisions of the compact shall be applicable to the Delaware river basin commission or to any matter governed by the compact.

**§ 2. Effectuation.** The compact set forth in the conservation law as amended by section one of this act shall become binding and effective in accordance with the provisions of subdivision twenty-one of section fourteen of article fourteen thereof. The governor is hereby authorized and directed to sign and seal the compact as provided in said subdivision twenty-one and to cause copies thereof to be filed in accordance therewith.

**§ 3. Effective Date.** This act shall take effect immediately.

PENNSYLVANIA: (*from Pennsylvania Acts of 1961, Act No. 268*)

**Section 2. Repealer.** All acts and parts of acts inconsistent with any provision of this act are to the extent of such inconsistency hereby repealed.

**Section 3. Effectuation by Chief Executive.** The chief executive is authorized to take such action as may be necessary and proper in his discretion to effectuate the compact and the initial organization and operation of the commission thereunder.

**Section 4. Effective Date.** This act shall take effect immediately.



**A RESOLUTION** to adopt a system of water supply charges relating to the surface waters of the basin.

**WHEREAS**, in December 1964 the Commission adopted its basic water supply policy, by Resolution No. 64-16A, under which the Commission would agree to assume the obligation to repay the United States for the water supply costs of major federal water supply projects in the basin, and would provide for the sale of water developed by such projects; and

**WHEREAS**, in April 1971, by Resolution No. 71-4, the Commission duly adopted, after public hearing, an amendment to the Comprehensive Plan defining the means by which the Commission would contract for the sale of water and establish rates therefor; and

**WHEREAS**, during the summer of 1971 the Commission staff prepared a basinwide inventory of all existing water users, as the basis for determining water supply charges, and for identifying certain water users who are entitled under the Compact to take certain quantities of waters of the basin without charge; and

**WHEREAS**, in February 1973 the Commission conducted public hearings on draft regulations relating to the establishment of specific water supply charges; and

**WHEREAS**, in August 1973 the Commission staff prepared and published an analysis of the issues raised at the February hearing and circulated draft regulations revised to reflect the views and comments, and the analysis, and the Commission then announced that further hearings would be held; and

**WHEREAS**, in February 1974 the Commission staff prepared an environmental assessment of the proposed water supply charges in accordance with the guidelines of the Council on Environmental Quality and the Commission's Rules of Practice and Procedure, and on the basis of that assessment the Executive Director has duly issued a Negative Declaration, having found

that the proposed regulations would not significantly affect the quality of the human environment; and

WHEREAS, in March 1974 the Commission held a public hearing on the revised draft of water sales regulations that was distributed in August 1973; and

WHEREAS, the public hearing of March 1974, and the issues raised therein, have been analyzed by the Commission staff, and further revisions in view thereof have been incorporated in the final draft regulations; now therefore

1. The Administrative Manual is hereby amended by adding new Articles to Part III, Basin Regulations, to read as follows:

*Article 5-1*

Section 5-1.1. *Water supply policy.* The provisions of Resolution No. 71-4 (Comprehensive Plan) relating to water supply charges, are incorporated herein and made a part hereof.

Section 5-1.2. *Prohibition; Sanctions.* Any person, firm, corporation or other entity, including a public corporation, body or agency, who shall use, withdraw or divert surface waters of the basin, shall pay such charges therefor as may be required by this Resolution. Any violation of this Resolution shall be subject to penalty as prescribed under Article 14.17 of the Compact. The Commission may also recover the value (according to the established water pricing schedules of the Commission) of any such use, withdrawal, or diversion, and invoke the jurisdiction of the courts to enjoin any further use, withdrawal or diversion, unless all charges under this Resolution are paid in full when due.

Section 5-1.3. *Exempt uses under the Compact.*

(a) Section 15.1(b) of the Delaware River Basin Compact provides that "no provision of Section 3.7 of the Compact shall be deemed to authorize the Commission to impose any charge for water withdrawals or diversions from the basin if such withdrawals or diversions could

lawfully have been made without charge on the effective date of the Compact; . . . " In compliance with this provision: There shall be no charge for water withdrawn or diverted in quantities not exceeding the legal entitlement of the user, determined as of October 27, 1961. Each water user may submit proof satisfactory to the Commission of the factors constituting legal entitlement, as defined in paragraph (b) hereof. In the absence of such proof of these conditions as of October 27, 1961, the quantity of water exempt from charge to each user will be the legal entitlement of the user determined as of March 31, 1971.

(b) For the purposes of paragraph (a) of this section:

1. "Legal entitlement" means the quantity or volume of water expressed in million gallons per month determined by the lesser of the following conditions:

(i) a valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(ii) physical capability as required for such taking; or

(iii) the total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.

2. "Physical capability" means the capacity of pumps, water lines and appurtenances installed and operable, determined according to sound engineering principles. The physical capability specifically includes plant facilities actually using water, but excludes facilities which may have been installed in anticipation of future plant expansion not yet realized.

(c) Whenever adequate records of legal entitlement for agricultural irrigation purposes are not available to the Commission, such legal entitlement shall be measured by the maximum number of acres under irrigation

by the water user at any time during the year ending March 31, 1971, allowing one acre-foot of surface water annually per acre irrigated.

(d) Notwithstanding the provisions of (a), (b) and (c) there shall be no charge for water made available from storage where: (i) the cost of the storage facility has or will be otherwise paid for by the user, (ii) such storage controls a drainage area, and (iii) the use does not exceed the yield of such storage without augmentation from other surface water of the basin.

Section 5-1.4. *Effective date of rates.* Rates and charges shall apply to all water users not exempt hereunder on and after the date of the first impoundment of water for water supply purposes at the Beltzville Reservoir (February 8, 1971), or the effective date hereof, whichever is later.

#### *Article 5-2*

##### *Section 5-2.1. Certificate of entitlement.*

(a) The Executive Director will issue to each known water user a certificate of entitlement within 30 days after the effective date of these regulations subject to the provisions of paragraph (b). In addition, any other water user may apply for a certificate of entitlement at any time. A preliminary notice of entitlement shall be issued to each user. Such entitlement shall become final and take effect, unless the user shall file with the Commission, within 20 days after the service of the notice of entitlement, a request for hearing by the Commission. At such hearing the water user may show cause why the proposed entitlement shall not take effect.

(b) The Executive Director shall schedule a hearing to be held not less than ten days after receipt of a request for a hearing by the Commission. Hearings shall be conducted and the results thereof subject to review in accordance with Article 5 of the Commission's Rules of Practice and Procedure.

(c) A final certificate of entitlement will be issued either upon expiration of the time to request a hearing, where there has been no request, or in accordance with the determination of a hearing where one is held.

(d) A certificate of entitlement is not transferable, except as provided in paragraphs (e) and (f) below.

(e) Whenever ownership or possession of land in agricultural use is transferred, a certificate of entitlement with respect to such land shall be deemed to run with the land, so long as the water use continues to be for agricultural irrigation. Upon any such land transfer, the Executive Director will reissue a certificate of entitlement to the new user.

(f) A certificate of entitlement may be transferred in connection with a corporate reorganization within any of the following categories:

(i) whenever property is transferred to a corporation by one or more persons solely in exchange for stock or securities of the same corporation, provided that immediately after the exchange the same person or persons are in control of the transferee corporation, that is, they own 80% of the voting stock and 80% of all other stock of the corporation;

(ii) whenever the transfer is an incident of a statutory merger or consolidation pursuant to the corporation laws of any state, the District of Columbia or the United States;

(iii) whenever the transfer is included in a transfer by a corporate holder of a certificate of entitlement of all or a part of its assets to another corporation if immediately after the transfer the transferor or one or more of its stockholders, or any combination thereof, are in control of the corporation to which the assets are transferred, and such transfer is in exchange solely for stocks or securities of the transferee corporation as a party to a reorganization

within the meaning of Section 354 or Section 361 of the Internal Revenue Code; or

(iv) where such transfer is required merely as a result of a change of the name, identity, form or place of organization of a corporate holder of a certificate of entitlement.

Section 5-2.2. *Measurement and billing of water taken.*

(a) The quantity and volume of waters used by each person shall be determined by meters, or other methods approved by the Commission, installed, maintained and read by or on behalf of the taker. Meters or other methods of measurement shall be subject to approval and inspection by the Commission as to installation, maintenance and reading.

(b) Each user of surface water who is not exceeding the quantity specified in his "certificate of entitlement" shall annually, on or before January 31, file with the Commission, on a form to be prescribed by the Executive Director, a report of the user's physical capability as defined, permit limitations, and the volume of water used during the preceding year.

(c) Each user of surface water who is taking a quantity of water greater than the amount specified in his "certificate of entitlement" shall report his usage to the Commission on or before April 30, July 31, October 31 and January 31, of each year covering the next preceding calendar quarter, respectively, on forms to be prescribed by the Executive Director. The amount due for water usage in excess of the legal entitlement for each of the first three quarters of a calendar year shall be computed and paid by the user, together with the report.

(d) The Commission will render a statement of the net amount due based on the fourth quarter report, including a negative or positive adjustment, so that the net total billing and payment for four quarters will equal the

total water used during the four quarters less the user's legal entitlement, if any.

Section 5-2.3. *Payment of bills.* The amount due for each quarter shall bear interest at the rate of 1% per month for each day it is unpaid beginning 30 days after the due date of the quarterly report for the first three quarters and 30 days after the bill is rendered for the fourth quarter.

### *Article 5-3*

Section 5-3.1. *Schedule of water charges.* The Commission will from time to time, after public notice and hearing, make, amend and revise a schedule of water charges. Until changed, the charge for water shall be as follows:

- (a) Four cents per thousand gallons for consumptive use; and
- (b) Four-tenths of a mill per thousand gallons for non-consumptive use.

Section 5-3.2. *Contracts; Minimum charge.* Subject to the exclusions for certificates of entitlement and exempt uses, the Executive Director may require contracts for any taking, use, withdrawal or diversion of waters of the basin. Each contract shall provide for a minimum annual payment in accordance with an estimated annual demand schedule, regardless of use, withdrawal or diversion. The failure of any person to execute a contract under this section shall not affect the application of other requirements of this resolution.

Section 5-3.3. *Exempt use.* The following uses shall be exempt from charge:

- (a) Non-consumptive uses of less than 1,000 gallons during any day, and less than 100,000 gallons during any quarter;
- (b) Ballast water used for shipping purposes;



(c) Water taken, withdrawn or diverted from streams tributary to the river master's gauging station at Montague; and

(d) Water taken, withdrawn or diverted below R.M. 38 (the mouth of the Cohansey River) and such proportion of waters taken, diverted or withdrawn above R.M. 38 and below R.M. 92.4 (the mouth of the Schuylkill River) as the Executive Director may determine, on the basis of hydrologic studies, would have no discernible effect upon the maintenance of the salt front below the mouth of the Schuylkill River.

Section 5-3.4. *Cooling water.* Water used exclusively for cooling purposes which is returned to the stream in compliance with the effluent requirements of applicable water quality standards, shall be charged at the non-consumptive use rate except that losses due to instream evaporation caused by cooling uses will be charged as consumptive use.

Section 5-3.5. *Historical use.* A person who or which could not for any reason use, take, withdraw or divert waters of the basin from the place in question on March 31, 1971, shall not be entitled to a certificate of entitlement.

#### *Article 5-4*

Section 5-4.1. *Definitions.* For the purposes of this Article, except as otherwise required by the context:

(a) "Person" means any person, corporation, partnership, association, trust, or other entity, public or private.

(b) "Water user" means any person who uses, takes, withdraws or diverts surface waters within the Delaware River Basin.

(c) "Executive Director" means the Executive Director of the Delaware River Basin Commission.

(d) "Consumptive Use" means the water lost due to

transpiration from vegetation in the building of plant tissue, incorporated into products during their manufacture, lost to the atmosphere from cooling devices, evaporated from water surfaces, exported from the Delaware River Basin, or any other water use for which the water withdrawn is not returned to the surface waters of the basin undiminished in quantity.

Section 5-4.2. *Effective date.* This resolution shall take effect upon its adoption.

ADOPTED: May 22, 1974

82-1515

Office-Supreme Court, U.S.

FILED

MAY 2 1983

ALEXANDER L. STEVAS,  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 1982

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DELAWARE RIVER BASIN  
COMMISSION, ET AL.,

*Respondent*

*v.*

BUCKS COUNTY WATER AND SEWER AUTHORITY,

*Petitioner*

---

**BRIEF OF THE DELAWARE RIVER BASIN  
COMMISSION IN OPPOSITION  
TO PETITION OF BUCKS COUNTY  
WATER AND SEWER AUTHORITY  
FOR WRIT OF CERTIORARI**

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On Writ of Certiorari to the United States Circuit Court  
of Appeals for the Third Circuit.

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## **I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED**

A. WHETHER THE CONSITUTIONALITY OF SECTION 15.1(b) OF THE DELAWARE RIVER BASIN COMMISSION COMPACT (PUBLIC LAW 87-328, 75 STAT. 688) WOULD BE PROPERLY BEFORE THIS COURT FOR CONSIDERATION SHOULD THE PETITION FOR CERTIORARI BE GRANTED IN VIEW OF PETITIONER'S FAILURE TO PRESERVE THIS ISSUE BEFORE THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

B. WHETHER PETITIONER HAS RAISED ISSUES OF SUCH PARAMOUNT CONSTITUTIONAL CONCERN AS TO COMPEL FURTHER JUDICIAL REVIEW OF THE EXEMPTIONS OF PRE-COMPACT WATER USERS BY THE DELAWARE RIVER BASIN COMMISSION WHEN SUCH AN EXEMPTION IS BASED UPON FEDERAL LAW AND PETITIONER HAS NOT ARGUED THAT THE COMMISSION DID NOT ACT IN ACCORDANCE WITH THIS LAW.

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## STATEMENT OF THE CASE

The Delaware River Basin Commission (DRBC) was created by a Compact enacted in 1961. The parties to the Compact were the States of Delaware, New Jersey and New York and the Commonwealth of Pennsylvania and the United States of America. (A-4) The federal government did not merely consent to this interstate Compact but enacted the Compact as a Federal Law, including as a part thereof Section 15.1 in which the United States set forth the conditions and reservations upon which it became a signatory party and participating member of the Compact. (A-124)

The DRBC is responsible for the conservation, development and management of the waters of the Delaware River Basin. DRBC was created by the parties to the Compact to be the agency for resolving interstate differences over the waters of the Basin and in an effort to avoid the continuation of litigation between the States of the Basin, the most recent of which reached this Court in 1954. *New Jersey vs. New York*, 347 U.S. 995.

In 1974, DRBC adopted Resolution 74-6 which provided for a system of water supply charges to provide funds to pay for the cost of certain water supply projects and certain other costs of the Commission. (A-134 to A-142) This Resolution imposed such charges on all water users of the Basin except for pre 1961 water users which were required to be exempted by federal law. This exemption, set forth in Section 5-1.3 of the Resolution, provides that pre-Compact water users need not pay water charges based upon the provision inserted by the federal government, Section 15.1(b) of DRBC's Compact, which provides:

"No provision of Section 3.7 of the Compact shall be deemed to authorize the Commission to impose any charges for water withdrawals or diversions from the Basin if such withdrawals or diversions could



lawfully have been made without charge on the effective date of the Compact. . ."

The authority of DRBC to impose water charges and the validity of Resolution 74-6 was litigated and upheld in *Borough of Morrisville vs. Delaware River Basin Commission*, 339 F.Supp. 469 (E.D. Pa. 1975) aff'd per curiam 532 F2d 745 (3rd Cir. 1976).

The present action was initiated by DRBC against Bucks County Water and Sewer Authority (Bucks County), a local agency created after 1961, and the City of Philadelphia (Philadelphia) to force the defendants to pay water user charges assessed pursuant to Resolution 74-6 for the water used by Bucks County. Bucks County purchases water from Philadelphia for sale to its customers. Philadelphia obtains its water supply directly from the Delaware and Schuylkill Rivers.

Bucks County contended before the U. S. District Court that it was not subject to water charges because Philadelphia held a "legal entitlement"<sup>1</sup> from DRBC which exempted it from water charges under the Resolution. Bucks County insisted that it fell within the City's exemption. Philadelphia denied that Bucks County was within its exemption. The City argued that any responsibility for water charges was exclusively that of Bucks County and cross-claimed for indemnity. DRBC took the position that Philadelphia's exemption from water charges was limited to sales of water to its residents. At oral argument, Bucks County also raised the issue of equal protection contending the exemption granted to pre-Compact water users was unconstitutional.

The District Court ruled that Philadelphia's legal entitlement was for the benefit of its residents only and did not extend to Bucks County. It also rejected the ar-

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1. DRBC has issued "entitlements" for the limited purpose of determining exemptions from water charges. Such "entitlements" do not extend to any other "rights" to the waters of the Delaware Basin.

gument that Section 15.1(b) violated the provisions of equal protection. *Delaware River Basin Commission vs. Bucks County Water and Sewer Authority*, 474 F.Supp. 1249, 1255 (E.D. Pa. 1979).

Judgment was entered in favor of DRBC against both Bucks County and Philadelphia. As between the defendants, it was eventually stipulated that any liability for water charges would be the responsibility of Bucks County.

Bucks County abandoned on its initial appeal all challenges to the holdings of the District Court except a constitutional argument based upon an alleged violation of the equal protection provision. (A-32) The Court of Appeals held that Bucks County did not frame its constitutional challenge as an attack upon Section 15.1(b) of the Compact itself but limited itself to the argument that Resolution 74-6 implemented the Compact's grandfather clause in an unconstitutional manner. (A-32) The Court of Appeals also found that Bucks County did not contend "that in enacting Resolution 74-6 the Commission exceeded its powers under the Compact." (A-33) The majority of the appeal panel, however, directed that this matter be remanded for the limited purpose of determining whether DRBC's Resolution 74-6 implemented Section 15-1(b) of the Compact in an unconstitutional manner.

On remand, the District Court granted leave to intervene to the 12 parties that applied. (A-25) These included the States of New Jersey and New York, the Commonwealth of Pennsylvania, several steel companies and other private water users who joined with DRBC and Western Berks Water Authority which joined with Bucks County. A substantial group of documents were developed concerning the legislative history of DRBC's Compact which were presented to the District Court. Based upon this record, the briefs and oral argument, the District Court on March 26, 1982, again entered an order rejecting Bucks County attack upon

Resolution 74-6. (A-3) Bucks County and intervenor Western Berks Water Authority were unsuccessful on appeal (A-73) and in their petition for a rehearing. (A-74)

## ARGUMENT

**A. The constitutionality of Section 15.1(b) of the Delaware River Basin Compact was not raised below and is not properly before this Court now.**

Petitioner contends that it challenges the constitutionality of Section 15.1(b) of DRBC's Compact. Although this issue was raised by petitioner at the initial hearing before the U. S. District Court, it abandoned this argument on its first appeal. The Court of Appeals, in its 1981 opinion, defined the issue before it as follows:

"On appeal, the Authority challenges the District Court's holding on the equal protection issue. The Authority does not frame its constitutional challenge as an attack on Section 15.1(b) of the Compact, however. Instead, it maintains that Resolution 74-6 implements the Compact's "grandfather" provision in an unconstitutional manner." (A-32)

The District Court, in the opinion issued following the rehearing, specifically noted that Section 15.1(b) was "a provision not challenged in the Court of Appeals and not open to challenge here." (A-23)

The validity of this section of the Federal Law, therefore, was not before the District Court on remand nor was it subject to reargument when Bucks County appealed the 1982 District Court decision.

**B. The arguments of petitioner concerning the constitutionality of Resolution 74-6 are without merit.**

Since petitioner cannot contest the validity of 15.1(b) itself, there is no valid basis for its argument that DRBC acted improperly by including within Resolution 74-6 an exemption for pre-61 water users. The exemption of pre 1961 water users was mandated by Congress in Section 15.1(b) and the omission of such an exemp-

tion by DRBC would have been in direct contravention of Federal Law. Petitioner, therefore, cannot contend that the exemption of pre 1961 water users in Resolution 74-6, in and of itself, is unconstitutional. Nevertheless, the only reasons supporting its argument that Resolution 74-6 improperly implemented the provisions of 15.1(b) that have been offered by Petitioners are based solely on the fact that 1961 water users have been exempted. Petitioner does not discuss the manner in which Resolution 74-6 implements the Compact exemption nor does it set forth an argument concerning the alleged constitutional shortcomings of the exemption provision in the Resolution. In the absence of any discussion of this issue, petitioner certainly has failed to set forth compelling reasons for this matter to be reviewed by this Court.

**C. To the extent that the exemption of pre 1961 water users by Federal Law is subject to further judicial consideration, such an exemption is consistent with prior decisions of this Court and is a valid Congressional act.**

1. In *Arizona v. California*, 373 U.S. 546, 563 (1963), this Court recognized the difficult nature of interstate disputes concerning water rights and stated its clear preference that, where possible, States settle their controversies by "mutual accommodation and agreement." In this case, congressional language protecting "present perfected rights" was approved. 373 U.S. at 581.

DRBC submits that Congress has not gone beyond its traditional and recognized role in enacting Section 15.1(b). The limitation on DRBC's right to charge users who were lawfully entitled to use water without charge when the Compact was adopted is completely consistent, in terms of recognized class or regulatory scheme, with many other water laws approved by the Congress

and upheld by this Court. Congress has repeatedly recognized existing or vested water rights and accorded them special treatment. For example, 43 U.S.C. §315(d) requires grazing permits issued by the federal government to recognize prior water rights. 43 U.S.C. §383 recognizes "vested rights" in connection with Federal Reclamation and Irrigation Acts. Finally, the Boulder Canyon Project Act, 43 U.S.C. §617(e), required the satisfaction of "present perfected rights" of certain water users.

The exemption of pre 1961 water users from water charges in DRBC's Compact is fully in accord with these other federal enactments and consistent with the holding of this Court in *Arizona v. California*, *supra*.

2. The standard of constitutional review to be applied in determining whether the exemption of pre 1961 water users violates the equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is the minimal judicial scrutiny or rational basis test. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The scheme of charges and exemptions authorized in Section 15.1(b) and implemented by Resolution 74-6, can be found to violate equal protection only if it bears no rational relationship to a legitimate state purpose.

This Court has made it clear that a social or economic regulation or statute will be upheld against equal protection challenges if it is "rationally related to furthering a legitimate state interest." *Vance v. Bradley*, 440 U.S. at 97, quoting *Massachusetts Br. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). If the classification has some reasonable basis, it will be upheld even if in practice it results in some inequality. *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

Moreover, the equal protection obligation "is not an obligation to provide the best governance possible."

*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Absent invidious discrimination or infringement upon a fundamental right (and no such claim has been made in this case), this Court has repeatedly recognized that there is a limited review power over Congress as to social or economic legislation. *Schweiker v. Wilson*, *supra* 450 U.S. at 230. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. at 175. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

Recent pronouncements on equal protection analysis of social and economic statutes or regulations state that such analysis comes to an end when it is determined that there are plausible reasons for Congress' action and that Congress did not achieve its purpose in a "patently arbitrary or irrational way." *Fritz*, *supra*, 449 U.S. at 177. It is "constitutionally irrelevant" whether such plausible reasons in fact underlay the legislative decision because it is not necessary for Congress to articulate its reasons for enacting a statute; it is sufficient if a court can hypothesize or postulate reasons for the statute. *Id.*; *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

In the sphere of local economic regulation, it is only the "invidious discrimination" or "the wholly arbitrary act" which violates the Equal Protection Clause, *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976):

"When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to the legislative determinations as to the desirability of particular statutory discriminations"\*\*\*\* Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation



of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

DRBC submits that the District Court in its several opinions set forth several plausible reasons to support or justify the enactment of Section 15.1(b). Moreover, the recognition of existing rights to use the waters of the Basin without charge, in and of itself, is a valid state purpose and falls within the discretion vested in the Congress.

3. Petitioner would seek to place before this Court alleged political purposes to explain the inclusion of Section 15.1(b) within DRBC's Compact. To advance this argument, petitioner contends that Section 15.1(b) was included within the Compact in order to provide sufficient political support to enable the Compact to obtain federal approval. DRBC has argued below and would argue to this Court that the record does not support the suggestion that the Compact would not have been passed by the Congress without the inclusion of Section 15.1(b) or that the Section was inserted solely for that reason. Neither the official or unofficial documents comprising the record of this case provide a basis for determining the actual motivation of Congress, even assuming an inquiry into the motives of Congress was proper. This Court, however, has long recognized that such an inquiry is not appropriate for the judiciary and does not provide a valid basis for declaring legislation unconstitutional. *U. S. v. O'Brien*, 391, U.S. 366 (1968).

**CONCLUSION**

For the foregoing reasons, the Petition for Certiorari should be dismissed.

Respectfully submitted,

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ALEXANDER L. STEVENS

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82-1515

IN THE  
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**October Term 1982**

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*Petitioner*

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
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**BRIEF IN OPPOSITION SUBMITTED ON BEHALF  
OF RESPONDENTS UNITED STATES STEEL  
CORPORATION, BETHLEHEM STEEL  
CORPORATION AND BETHLEHEM  
MINES CORPORATION**

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MINES CORPORATION**

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NOW COME Respondents United States Steel Corporation, Bethlehem Steel Corporation and Bethlehem Mines Corporation (hereinafter "Respondents")<sup>1</sup> and respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Third Judicial Circuit in this case.

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1. Pursuant to Rule 28(1) of the Rules of the Supreme Court, Respondents have attached hereto as Exhibit A a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates.

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## **I. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

Contrary to the assertion of the Petition for Writ of Certiorari, the constitutionality of the Delaware River Basin Compact itself has never heretofore been questioned and, accordingly, is not an issue which may be properly raised before this Court now.

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## **II. STATEMENT OF THE CASE**

### **A. Procedural**

This proceeding was commenced in 1977 as a suit by the Plaintiff, Delaware River Basin Commission ("DRBC"), against the Bucks County Water and Sewer Authority ("Bucks County") and the City of Philadelphia. DRBC sought to recover charges for Delaware River water acquired by Bucks County from Philadelphia. Philadelphia cross-claimed against Bucks County requesting indemnification. DRBC moved for summary judgment against both Defendants who cross-moved for summary judgment against DRBC.

On July 27, 1979, the United States District Court for the Eastern District of Pennsylvania granted DRBC's motion for summary judgment and denied those filed by the defendants. See *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, 474 F.Supp. 1249 (E.D. Pa. 1979) (A-60).<sup>2</sup> In doing so, the Court spe-

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2. Refers to *Appendix to Petition of Bucks County Water and Sewer Authority for Writ of Certiorari*, page 60. All of the prior opinions in this matter shall be cited hereinafter as *DRBC v. Bucks County*.



cifically rejected the contention of Bucks County that DRBC Resolution 74-6 (A-134) violated the constitutional guarantee of equal protection of the law. 474 F.Supp. at 1255 (A-70).

Bucks County appealed the District Court's decision to the Third Circuit. The only constitutional issue presented by the appeal concerned Resolution 74-6. The appeal did not question the constitutional validity of Section 15.1(b) of the Compact itself. *DRBC v. Bucks County*, 641 F.2d 1087, 1091 (3rd Cir. 1981) (A-27, 32).

On February 18, 1981, the Third Circuit decided that, based upon the limited information available, it could not conclude that the Resolution is constitutional. *Id.* at 1100 (A-51-52). That Court, therefore, remanded the case to the District Court for the purpose of permitting the DRBC and other interested parties an opportunity to research and to further exemplify the rationale underlying the current exemptions. *Id.*

By Order of July 20, 1981, the District Court granted leave to intervene to twelve parties, including the three Respondents jointly submitting this memorandum (A-25). The parties filed cross motions for summary judgment and, by Order entered March 26, 1982, the District Court granted judgment in favor of DRBC and "plaintiff-intervenors" (A-3). On April 9, 1982, a notice of appeal was filed with the Third Circuit by intervenor, Western Berks Water Authority, and on April 13, 1982, another notice of appeal was filed by Bucks County. The appeals were docketed at Nos. 82-1232 and 82-1233, respectively, and on June 3, 1982, a motion to consolidate the appeals was granted. The Opinion of the District Court supporting its Order of March 26, 1982 was issued on June 30, 1982. *DRBC v. Bucks County*, 545 F.Supp. 138 (E.D. Pa. 1982) (A-4). Oral argument was held before the Third

Circuit, and on January 6, 1983, that Court issued its Judgment Order affirming the Opinion and Order of the District Court (A-1-2).

On or about March 11, 1983, Bucks County filed its Petition for Writ of Certiorari with this Court.

### **B. Factual**

These Respondents are aware that a Brief in Opposition is to be filed by Respondent DRBC. We believe that DRBC's brief includes a sufficient statement of factual matters necessary to decide whether or not a writ should issue, and we, therefore, adopt and join with that statement.

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## **III. SUMMARY OF ARGUMENT**

The Petition for Writ of Certiorari should be denied because it fails to raise any important and unresolved federal question which requires a decision by this Court. Furthermore, the Third Circuit's Order affirming the Opinion of Judge Louis H. Pollok is in accord with the decisions of this Court which analyze the requirement of "equal protection".<sup>3</sup>

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3. Respondents have been advised of the contents of the DRBC brief. Accordingly, Respondents have attempted to minimize repetition by merely supplementing portions of the DRBC Argument.

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#### IV. ARGUMENT

Petitioner's arguments to this Court in support of its Petition for a Writ of Certiorari are limited. It argues (1) that the case involves a significant question of federal law and (2) that the decision below concerning the equal protection of laws conflicts with the applicable decisions of this Court.<sup>4</sup>

The issue involved in this case cannot objectively be characterized as a significant public or political question as alleged by Petitioner.<sup>5</sup> It is really quite narrow, i.e. to what extent and in what manner may the DRBC charge users for water withdrawals from the Delaware River. The answer to the question affects a limited class in a limited geographical area. The interests involved are primarily state interests since it is the citizens of the Compact states who ultimately have to sustain the water withdrawal charges assessed by DRBC. Historically, the

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4. See Rule 17(c) of the Supreme Court.

5. In point of fact, it is only in the most expansive sense that the issue as framed for this Court by Bucks County may even be considered to be federal. The Compact is first and foremost an agreement between the states of New York, New Jersey, Delaware and the Commonwealth of Pennsylvania. Delaware River Basin Compact, Act of September 27, 1961, Pub. L. 87-328, 75 Stat. 688; 7 Del. Code Ann. §§6501, 6511 et seq.; N.J. Stat. Ann. §§32.11 D-1 et seq.; New York Conservation Law, §§801 et seq. (McKinney); 32 Purdon's §§815.101 et seq. Although the federal government is an actual party to the Compact, the issue of water withdrawal charges does not affect any significant federal interest.

interests of individual users of Delaware Basin waters have been represented by the Compact states, acting *in parens patriae*, both in litigating their water rights disputes before this Court,<sup>6</sup> and in entering into the Compact. See *Badgley v. New York*, 606 F.2d 358 (2nd Cir. 1979), *cert. denied*, 447 U.S. 906 (1980). It is noteworthy, therefore, that none of the states who are party to the Compact intervened on behalf of Bucks County. Instead, the states of New York and New Jersey and the Commonwealth of Pennsylvania have all opposed Bucks County.

The additional argument made by Bucks County is that the Third Circuit's decision conflicts with the applicable decisions of this court because there is, allegedly, no conceivable rational basis for the classification used by the DRBC rate system. Clearly the best response to this argument is the able and scholarly opinion rendered by the District Court, on remand. *DRBC v. Bucks County*, 545 F.Supp. 138 (E.D. Pa. 1982) (A-4). The whole point of the 1981 remand by the Third Circuit was to permit the District Court to analyze the purposes underlying DRBC Resolution 74-6 and to determine their constitutional propriety. *DRBC v. Bucks County, supra*, 641 F.2d at 1100 (A-27 at 51-52). As noted in Petitioner's statement of the case, a great deal of additional documentation concerning the history of the Compact was made available to the District Court on remand. That documentation enabled the District Court to place into

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6. *New Jersey v. New York*, 280 U.S. 528 (1930); *New Jersey v. New York*, 283 U.S. 336 and 283 U.S. 805 (1931); *New Jersey v. New York*, 345 U.S. 369 (1953); *New Jersey v. New York*, 347 U.S. 995 (1954).

context and analyze in detail the purposes underlying DRBC Resolution 74-6.<sup>7</sup> *DRBC v. Bucks County*, *supra* (A-4). The District Court's analysis obviously was sufficient to allay the concerns of the Third Circuit. Analysis of the District Court's decision will show that it is in strict accord with the decisions of this Court pertaining to requirements of equal protection of law. *Western and Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648 (1981); *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

Finally, Bucks County complains that the political process which was used to forge the Compact was abused or manipulated. When analyzed, however, its real complaint is that the political process was used at all. The basis of its complaint is simply that industrial users, who would have been among those most adversely affected by a grant of general ratemaking authority to DRBC, chose to exercise their rights to petition the legislatures, to

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7. Petitioner now asks this Court to ignore the history of the Compact and to look only at the so-called "pooled water" theory which was earlier advanced by the DRBC as a partial rationale for the imposition of charges when Resolution 74-6 was being considered. See *Morrisville v. DRBC*, 399 F.Supp. 469 (E.D. Pa. 1975), *aff'd per curiam*, 532 F.2d 745 (3rd Cir. 1976). Despite Bucks County's advocacy of myopia, however, the regulation must be analyzed against the full background of the provisions of the Compact and the intent of those who approved them. Such an analysis was made by the District Court.

voice their concerns, and to seek clarification of the limitations on the powers given DRBC by the Compact.<sup>8</sup>

It has long been clear that inquiry into the "motives" of legislators when enacting statutes is impermissible. A constitutional enactment may not be struck down solely on the ground of an alleged improper motive. E.g., *United States v. O'Brien*, 391 U.S. 367 (1968). More to the point, however, it cannot be said that a legislature acts improperly when it responds to the petitions of those who would be affected by proposed legislation and acts to clarify that legislation.

Bucks County's efforts to transmute a constitutionally protected process into an "improper legislative purpose" deserve to be rejected. An appeal to the equal protection requirements of the Fifth and Fourteenth Amendments to the Constitution of these United States cannot and should not be used as a basis to undermine political processes and solutions. See *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); *Vance v. Bradley*, 440 U.S. 93 (1979); *Rogin v. Bensalem Township*, 616 F.2d 680, 687-688 (3rd Cir. 1980), *cert. denied*, *Mark-Garner Associates, Inc. v. Bensalem Township*, 450 U.S. 1029 (1981).

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8. Through the course of this case there has never been a procedural opportunity to plumb Petitioner's argument to its depth. It seems, however, to be somewhat passionate and invidious in its overt suggestion that corporations, such as these Respondents, should be denied access to any political process. We question whether Petitioner would make the same arguments if the process had been used by individual riparian owners only.

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## V. CONCLUSION

Wherefore, for the above reasons, Respondents respectfully request that this Court deny the petition for certiorari filed by Bucks County Water and Sewer Authority.

Respectfully submitted,

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April 29, 1983

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**EXHIBIT A**

Pursuant to Rule 28(1) of the Supreme Court, a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents follows:

**RESPONDENT, UNITED STATES STEEL CORPORATION**

1. Athlone Prospecting and Development Corporation Ltd. (Irish Republic)
2. Brazaco-Mapri Industrias Metalurgicas S.A. (Brazil)
3. Compagnie de Gestion de Mifergui-Nimba, Ltee.
4. Companhia Meridional de Mineracao (Brazil)
5. Industria de Tubos y Perfiles S.A. (INTUPERSA) (Guatemala)
6. Minerales Ordaz, C. A. (Venezuela)
7. Rama Sapyakorn Patana Limited (Thailand)
8. Terninoss Acciai Inossidabili S.p.A. (Italy)

**RESPONDENTS, BETHLEHEM STEEL CORPORATION AND BETHLEHEM MINES CORPORATION**

1. Bethlehem Singapore Private Limited
2. Hibbing Taconite Company
3. Erie Mining Company
4. Erie Mining Company, a Limited Partnership
5. Erie Development Company
6. Enstar/Bethlehem (Gas & Oil Joint Venture)
7. Kirby/Bethlehem (Gas & Oil Joint Venture)

8. Forest Oil/Bethlehem (Gas & Oil Joint Venture)
  9. Industria e Comercio de Minerios S.A.—Icomi (which in turn has more than 50 subsidiaries and affiliates)
  10. Iron Ore Company of Canada (which in turn has more than 10 subsidiaries)
  11. Itmann Coal Company
  12. Kaycee Bentonite Partnership
  13. Lamco Joint Venture
  14. Met-Mex Penoles, S.A. de C.V.
  15. Penoles Metals & Chemicals, Inc.
  16. Minera Apolo, S.A. de C.V.
  17. Presque Isle Corporation
  18. Restauradora de las Minas de Catorce, S.A. de C.V.
  19. Seadrill, Incorporated
  20. Southeast, Incorporated
  21. Thailand Offshore Joint Venture
  22. Bethlehem Hotel Corporation
  23. Mahoning Ore and Steel Partnership
  24. Nordex Joint Venture
  25. Nubeth Joint Venture
  26. Ontario Iron Company
-

APR 27 1983

ALEXANDER L. STEVAS,  
CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1982

DELAWARE RIVER BASIN COMMISSION, ET AL,  
*Respondent,*

v.

BUCKS COUNTY WATER AND SEWER AUTHORITY,  
*Petitioner.*

On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Third Circuit  
(Third Circuit Court No. 82-1233)

**BRIEF IN OPPOSITION OF INTERVENOR  
STATE OF NEW YORK TO THE PETITION  
FOR A WRIT OF CERTIORARI**

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April 1983

### **Question Presented**

Does the challenged classification which exempts pre-1961 Delaware River Basin users from certain water charges comport with the Equal Protection Clause as a rational means of promoting legitimate purposes of the Delaware River Basin Compact?

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No. 82-1515

IN THE  
**Supreme Court of the United States**  
October Term, 1982

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DELAWARE RIVER BASIN COMMISSION, ET AL.,  
*Respondent,*  
*v.*

BUCKS COUNTY WATER AND SEWER AUTHORITY,  
*Petitioner.*

---

**On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Third Circuit  
(Third Circuit Court No. 82-1233)**

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**BRIEF IN OPPOSITION OF INTERVENOR  
STATE OF NEW YORK TO THE PETITION  
FOR A WRIT OF CERTIORARI**

---

**Statement of the Case**

**Proceedings Below**

This action was commenced by respondent Delaware River Basin Commission (DRBC) in 1977 to collect water-use charges, imposed pursuant to DRBC Resolution 74-6 (A. 134), from petitioner Bucks County Water and Sewer Authority (Bucks County) for water withdrawn from the



Delaware River Basin by the City of Philadelphia and sold to Bucks County. The District Court granted summary judgment for the DRBC holding that Resolution 74-6 which imposed the water-use charges generally but exempted certain users having a "legal entitlement" to take water from the Delaware River Basin in 1961 was not in violation of the Constitutional guarantee of equal protection. *DRBC v. BCWSA*, 474 F. Supp 1249 (E.D. Pa. 1979) (A. 57).

Bucks County appealed from the District Court's decision. The Court of Appeals for the Third Circuit determined that it did not have sufficient information to uphold the water-use charges on equal protection grounds; and it vacated the grant of summary judgment and remanded the case to the District Court in order to allow the DRBC an opportunity to "proffer some purpose that the court may reasonably presume to have motivated the Congress that added § 15.1(b) to the Compact [the section authorizing the exemption from water-use charges found in Resolution 74-6] [and which will be] a standard against which to test the rationality of Resolution 74-6." *DRBC v. BCWSA*, 641 F. 2d 1087, 1100 (3rd Cir. 1981) (A. 27, 52). The Third Circuit also suggested that the District Court encourage member States of the DRBC and current users of the River's waters to intervene in the proceedings in order to develop a full record (A. 52). Respondent New York State is one such intervenor. On remand, plaintiff DRBC and intervenor-plaintiffs moved for summary judgment; and in an order dated March 26, 1982 (A. 3), and for reasons set forth in an opinion dated June 30, 1982, *DRBC v. BCWSA*, 545 F. Supp. 138 (E.D. Pa. 1982) (A. 4), the District Court again granted summary judgment for plain-

tiffs, upholding the constitutional validity of Resolution 74-6. In a Judgment Order dated January 6, 1983, the Third Circuit affirmed the judgment of the District Court (A. 2).

### **The Decision of the District Court**

In its decision, the District Court carefully reviewed the terms and the legislative history of the Delaware River Basin Compact (Compact) (A. 75). It identified essentially two proper governmental purposes which were served by § 15.1(b) of the Compact (A. 124) and its implementing regulation, Resolution 74-6,\* which we will refer to collectively as the classification. Initially, the court recognized that the classification was a limitation on the DRBC's rate-making power which assured that those entities with legal rights to withdraw water from the Delaware Basin prior to the formation of the Compact could continue to exercise those rights without charge (A. 13-14). The court keyed the propriety of this legislative purpose into the language of § 1.3(e) of the Compact which states that "In general, the purposes of this compact are . . . to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin" (A. 87) and concluded that "the Compact's authors evidently considered it necessary to preserve expressly the pre-1961 users' privilege of free water use so that the fledgling Commission's chances of winning the cooperation of existing users [whose information and expertise were likely

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\* Earlier, the court stated that the only question before it was the constitutionality of Resolution 74-6 because the constitutionality of § 15.1(b) was "not challenged in the Court of Appeals and [is] not open to challenge here." (A. 22-23).

to be necessary to the DRBC's early efforts to perform its functions] would be increased." (A. 14).

The court also found that a corollary purpose of the classification was the protection of the significant reliance interests of those who had established rights to draw water free from the Basin at the time of the formation of the Compact. This, too, the court tied into one of the stated purposes of the Compact: "to make secure and protect present development within the State"\* (Compact § 1.3[e]) (A. 16). Noting that it would be difficult to measure with precision the full extent of the reliance interests, the court held that it was a fair inference that these interests extended beyond the levels of actual water use at the time of the formation of the Compact to include substantial reliance on the users' full " 'legal entitlement'—defined by Resolution 74-6—as of the Compact's enactment." (A. 16). This was because users would no doubt have engaged in maintenance and expansion activities based on their needs and expectations as to the free availability of water (A. 16-17). The court found that protecting such *in situ* interests from the burdens and dislocations of new regulatory schemes is a recognized proper governmental purpose, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, *rehearing denied* 450 U.S. 1027 (1981) (A. 17).

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\* The court also noted that an additional effect of § 15.1(b) was "to preserve in *status quo ante* the entitlement of all pre-Compact users to withdraw water without charge on a parity with the rights to free use of New Jersey and New York City that were secured by the 1954 Consent Decree (*New Jersey v. New York*, 347 U.S. 995) and confirmed in § 3.5 of the Compact." (A. 14). We point out here that this effect appears to comport with the purpose of the Compact "to apply the principle of equal and uniform treatment to all water users who are similarly situated . . . , without regard to established political boundaries." (Compact, § 1.3[e]).

Because the Third Circuit had expressed reservations about the seeming permanent character of the exemptions created by the classification, the District Court carefully addressed this issue. It found that because § 5-2.1(d) of Resolution 74-6 (A. 138) prohibits the transfer of free water use rights, it was likely that a significant number of pre-1961 withdrawals will not be perpetually exempt because as the pre-1961 users go out of existence they will be succeeded by new users who will not be permitted to acquire the exemption (A. 21-22). The court did recognize that some users, such as municipalities, are likely to exercise a permanent exemption and that insofar as the classification authorizes this, "it must be carefully reviewed." (A. 22). After such careful review, the court found that the classification exhibited the constitutionally required rationality, for it "does not treat identical groups differently, but rather establishes a financing scheme which respects two significant distinctions between those groups: First, it acknowledges the extent to which the cooperation of existing users was necessary to the early period of DRBC's work; and, secondly, it recognizes the different degree of reliance interest in free water use." (A. 23). Thus, "the classification . . . is not one that is 'wholly without any rational basis,' *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973)." Instead, "this classification appears to help promote the general goals of the Compact . . ." (A. 23).

## **Summary of Argument**

The sole issue here is whether the challenged classification is rationally related to proper purposes of the Compact. The exemption from rate charges of pre-1961 Basin users was designed to foster the cooperation of these users in the early, formative work of the Commission and to guard against economic dislocation by protecting the reliance interests of these users on their established rights to free Basin water. These are legitimate purposes of the Compact, and the classification is a rational means of advancing them. The classification, therefore, comports fully with the requirements of the equal protection clause.

## **Argument Why Certiorari Should Be Denied**

**The Judgment That the Classification Is a Rational Means of Furthering the Legitimate Goals of the Compact Fully Comports With This Court's Equal Protection Holdings and Is in All Respects Proper.**

There is no question that the rational basis test is the applicable standard for judging the classification at issue here. When that is the test, this Court has said that courts should "defer[] to legislative determinations as to the desirability of particular statutory discriminations. (citation omitted) . . . [and] presume the constitutionality of [such determinations] and require only that the classification challenged be rationally related to a legitimate state interest . . . [And] in the local economic sphere, it is only the invidious discrimination, the whole arbitrary act, which cannot stand consistently with the Fourteenth Amendment. (citation omitted)." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976).

As discussed above, the District Court found that at least two legitimate state (Compact) interests were served by the classification: encouragement of cooperation from pre-1961 users whose information and expertise were deemed important assets to the early efforts of the DRBC and the protection of the significant reliance interests of those users who had established rights to draw water free from the Basin at the time of the formation of the Compact. Petitioner does not really question the fact that the rate classification advances both of these interests, but rather focuses its argument on the question of the legitimacy of these governmental purposes.

As to the purpose of eliciting cooperation, petitioner attempts to characterize this as an impermissible political compromise and cites *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 391-392 (1978), for the proposition that a "State's need or desire to engender political support . . . cannot by itself justify an otherwise invidious classification." *Baldwin*, however, held that "the classification utilized in Montana's licensing scheme is not 'otherwise invidious discrimination.' " (at 392 n.24).

New York does not believe that the cooperative effort that the DRBC sought and believed necessary to achieve from affected user groups "for the planning, conservation, utilization, development, management and control of the water resources of the basin" (Compact §1.3[e]) is the type of general and popular political support deemed questionable in *Baldwin, supra*. In any event, this purpose of the classification does not stand "by itself" and is not "otherwise invidious" (*Baldwin, supra*).

Two other cases which have indicated that the desire to engender political support could not sustain an otherwise invidious classification are *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) and *Shapiro v. Thompson*, 394 U.S. 618 (1969). The issue in both of these cases involved durational residency requirements which conditioned the receipt of certain medical and welfare assistance, respectively. The residency requirements were held to affect the fundamental constitutional right of interstate travel and in both cases, because compelling state interests were not shown, were struck down. The classification here does not affect the exercise of fundamental constitutional rights, and there is nothing inherently invidious about it. All parties concede that a showing of a compelling state interest is not necessary to sustain it.

In this context, it is important to recognize that the classification also has as a purpose the protection of the reliance interests of pre-1961 Basin users. Thus, even regardless of questions about the merits of the purpose of ensuring cooperation, that latter purpose does not stand "by itself" as the basis for the legislation. In the economic sphere, contrary to what petitioner argues, protecting reliance interests and guarding against "serious economic and political dislocations" (A. 17) are legitimate and proper governmental purposes. In *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 466-468, this Court recognized the validity of a legislative determination banning a new, not yet established, method of milk packaging and permitting the continuance of an older method, thereby avoiding the severe economic dislocation of a total ban. Similarly, in *New Orleans v. Dukes, supra*, 427 U.S. at 305, the Court

upheld an ordinance banning street vendors generally but grandfathering certain older, more established vendors, stating that the City could "reasonably" recognize the "substantial reliance interests" of the older vendors.

As noted above, the classification here may involve some, though limited, permanency. A permanent classification, however, does not *per se* violate the equal protection clause. In *United States v. Maryland Savings Share Insurance Corp.*, 400 U.S. 4 (1970), the Court upheld an income tax exemption limited to certain nonprofit insurers organized prior to a specified date. The legislative rationale was that an extension of the exemption could lead to a proliferation of insurance companies which could interfere with the operations of certain federal institutions. In *Stanley v. Public Utilities Commission*, 295 U.S. 76 (1935), the Court upheld a Maine statute requiring common carriers to obtain certificates of public convenience and necessity and granting, automatically, such certificates to carriers which had provided service prior to a specified date. The Court found that the legislature could reasonably have determined "as of what period the service of carriers for hire over its highways did not impair their use or cause congestion, and require[d] certificates for those seeking to supply additional transportation for a later period." (p. 78). Both of the above cases, we submit, are directly analogous to this one, for they involved classifications which had the potential to grandfather permanently certain economic entities engaged in business prior to the need for and existence of the regulation at issue. Just as the Court upheld their validity, it should recognize the validity of the classification here.



In conclusion, the classification is rationally related to legitimate and legally recognized governmental interests and, therefore, comports fully with equal protection requirements.

### **Conclusion**

The petition for a writ of certiorari should be denied.

Dated: New York, New York  
April 1983

Respectfully submitted,

For the State of New York

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